IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1918

ADLENE HARRISON, Regional Administrator, and DOUGLAS COSTLE, Administrator of the Environmental Protection Agency,
Petitioners,

v.

PPG INDUSTRIES, INC. and CONOCO, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

The question posed by petitioners ("EPA" or "the Agency") would be stated more accurately as follows:

> Whether the court of appeals has original *and exclusive* jurisdiction under Section 307(b)(1) of the Clean Air Act, as amended, 42 U.S.C. § 7607(b)(1), to review a final action by the Administrator applying new-source performance standards to certain power generating facilities.

As EPA would have it, the courts of appeals have original and exclusive jurisdiction to review the Agency's action in applying regulatory standards to particular facilities. Indeed, EPA's arguments would extend an exclusive and original review jurisdiction of courts of appeals to any and all actions, of any type or description, taken by the Agency under the Clean Air Act, as amended ("the Act"), 42 U.S.C. §§ 7401-7642. EPA's position depends entirely upon the construction to be accorded to the phrase "other final action" used twice in Section 307(b)(1) of the Act, which otherwise specifically enumerates actions which are to be subject to review in courts of appeals. The judicial review provisions in Section 307(b) and in other parts of the Act either can be construed to reconcile the statutory language and Congress' intent, or can be construed to read broadly the two "other final action" phrases (as EPA urges) to produce contradictory and conflicting results with other parts of the Section and Act. This Court should seek the interpretation which best reconciles the statutory provisions. Respondents ("PPG" and "Conoco") contend that under such a reconciling interpretation courts of appeals do not have jurisdiction under the "other final action" phrase to review EPA's action in applying regulations. No other basis for jurisdiction of courts of appeals exists, and the decision of the Court of Appeals for the Fifth Circuit dismissing PPG's "protective" petition for lack of jurisdiction should be affirmed.

However, this case has an additional facet which strongly supports adoption of a reconciling interpretation. In the court of appeals PPG raised a further issue regarding jurisdiction which both PPG and Conoco wish to maintain before this Court. PPG contended that constitutional issues would arise with an expansive reading of the "other final action" phrases in Section 307(b)(1).

Section 307(b)(1) both specifies the actions subject to review in a court of appeals and requires that petitions

for review brought under its provisions must be filed within sixty days of the date on which notice of the action is given in *the Federal Register*. The immediately subsequent provision of the Act, Section 307(b)(2), operates in civil or criminal enforcement cases to preclude the presentation of defenses based upon matters which could have been raised in a review action brought in a court of appeals under Section 307(b)(1).[1] By their terms, the judicial-review provision and the review-preclusion clause are coextensive in scope.

PPG argued in the court of appeals that, if the review provision (any "other final action . . . which is locally or regionally applicable") were construed to pertain to any final local or regional action, of whatever nature, taken by EPA, the provision would violate the due process clause of the fifth amendment to the Constitution and should be given no effect. See Brief For Petitioner in the court of appeals, at 50. Many of the Agency's very informal actions would be brought within the compass of Section 307(b)(1), were that Section construed as expansively as EPA here argues. For many of these actions, review might not be actually sought in a court of appeals;[2] yet, the review preclusion clause would fore-

[1] This "review preclusion" clause is very harsh. A similar provision limiting judicial review of regulations under wartime price control legislation was upheld against due process objections by this Court in *Yakus* v. *United States*, 321 U.S. 414, 434-437 (1944).

[2] EPA can and does take a large number of "final actions" under the Act in a very informal way, as illustrated by the facts in the present case. See *infra*, at 5. These informal actions are not taken on the basis of a contemporaneously compiled administrative record. They include the Agency's decision to grant preconstruction approval for a new or modified facility located in a State which does not itself undertake such preconstruction review. Preconstruction review is required by Section 110(a)(2)(D) of the Act, 42 U.S.C. § 7410(a)(2)(D), and 40 C.F.R. § 51.18. For example, Mississippi does not provide preconstruction review, so EPA itself carries out this regulatory function within that State. See 40 C.F.R. § 52.1276. Another informal action by EPA is the

close defenses. In effect, the pair of provisions would combine to bar the opportunity to obtain judicial recourse or to present every available defense. The statute thus runs afoul of the due process clause. See *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972); *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932).

The court of appeals construed the judicial-review provisions of the Act to avoid the necessity of reaching this constitutional claim. In this Court, PPG and Conoco do not wish to abandon the claim, and accordingly must reiterate it now. Because the claim does not attack the decree and judgment of the court of appeals, but rather "merely asserts additional grounds why the decree should be affirmed," the claim is properly before the Court. *Langnes* v. *Green*, 282 U.S. 531, 539 (1931). See also *Jaffke* v. *Dunham*, 352 U.S. 280 (1957); *Walling* v. *General Industries Co.*, 330 U.S. 545, 547 n.5 (1947); *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435-436 (1924) (Brandeis, J.)[3]

Agency's decision to "blacklist" a particular facility (bar the facility from supplying goods or services to the federal government) under Section 306(c) of the Act, 42 U.S.C. § 7606(c), and 40 C.F.R. Part 15.

Included also are several minor and very repetitive types of "final" actions. Such actions include a decision by an EPA technician not to pass an individual car during a motor vehicle emissions inspection, where EPA establishes its own regulations and facilities to carry out such inspections upon failure of a State to do so. See Section 110(a)(2)(G) of the Act, 42 U.S.C. § 7410(a)(2)(G). Cf. *Environmental Protection Agency* v. *Brown*, 431 U.S. 99 (1977). Persons aggrieved by such minor actions would not be likely to carry their dispute with EPA to a court of appeals for review.

[3] As the Court said in *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977):

> [T]he prevailing party may defend a judgment on any ground which the law and record permit that would not expand the relief it has been granted.

The additional question reflecting PPG's and Conoco's constitutional claim can be stated as follows:

> If the clause in Section 307(b)(1) of the Act which calls for review in courts of appeals of unspecified "other final action . . . which is locally or regionally applicable" were to be construed as expansively as EPA here advocates, would it violate the due process clause in light of the coextensive review-preclusion provision of Section 307(b)(2)?

EPA's brief neither mentions nor discusses the constitutional facet of this case. Significantly, EPA's brief also fails to mention, let alone discuss, several statutory provisions which would be nullified if its expansive reading of the "other final action" phrases in Section 307(b)(1) were to be adopted. The most important of these ignored provisions is Section 206(b)(2)(B) of the Act, 42 U.S.C. § 7525(b)(2)(B), which sets out a special judicial-review procedure. EPA also has provided a severely truncated exegesis of the legislative history of amendments to the Act, which avoids many pertinent materials. In addition, EPA omits any reference to a uniform line of decisions in the courts of appeals construing special review provisions in this and other similar statutes contrary to the Agency's position here. EPA's complete failure to deal with these points unfortunately requires that this brief be longer than otherwise would be necessary.

SUPPLEMENTAL STATEMENT

PPG and Conoco do not quarrel with EPA's Statement, as far as it goes. In arguing the merits, however, EPA says it "do[es] not think that the administrative record in this case is 'skeletal'" (EPA's Br. at 24), notwithstanding the expressed view of the court of appeals to

the contrary. (587 F.2d at 244-245, Pet. App. 17a-20a.)[4] The court of appeals had a sound basis in the record for its opinion, and this supplemental statement will focus on that basis.

The entire certified record consists of 97 pages of correspondence.[5] The court of appeals noted that this record "may leave the reviewing court unable to verify the Administrator's grounds [for his determinations], or, perhaps, to identify those grounds at all." (587 F.2d at 244, Pet. App. 17a.)

The record shows that EPA determined PPG's "waste heat" boilers to be "new sources" subject to the Agency's Standards of Performance for Fossil-Fuel Fired Steam Generating Units (the "new source standards" or the "standards"). (A. 97-98, 104-106.) However, EPA did not actually apply the requirements of the new source standards to the waste-heat boilers. Instead the Agency imposed special *ad hoc* requirements drawn in part from the standards and in part from its own fiat. The record shows no basis, factual or legal, for this aspect of EPA's determinations.[6]

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[4] Several abbreviations are used in this brief. "Pet. App." refers to the appendix to the petition for certiorari. "A." refers to the Appendix to the Briefs, where the entire administrative record is reprinted. "EPA's Br." refers to petitioner's opening brief on the merits.

To avoid lengthy citations to provisions of the Clean Air Act, 42 U.S.C. §§ 7401-7642, this brief will cite only the sections of the Act itself, after an initial citation which includes also the corresponding section of the codification in Title 42 of the United States Code.

[5] As reprinted in the Appendix to the Briefs, this record takes up 108 pages.

[6] The problems arising due to the deficiencies in the record are compounded by EPA's *volte face* in "applying" the standards to the

1. The waste-heat boilers are an integral part of a power plant employing advanced "cogeneration" technology.

The term "cogeneration" is used to denote energy-efficient production both of electricity and of process steam at one power plant. PPG has a large multi-plant chemical works at Lake Charles, Louisiana ("Lake Charles Works" or "Works"), which requires significant amounts of both electricity and steam for its process operations. In these circumstances, use of cogeneration technology can provide a dependable source of power plus large savings in energy.

PPG's "Power Plant C" at the Lake Charles Works is a coordinated system consisting of two gas turbine generators, two "waste heat" boilers, and one steam turbo-generator.[7] Each gas turbine produces electricity from combustion of natural gas.[8] The exhaust gases from the turbines ordinarily would be vented to the atmosphere. However, because these exhaust gases contain considerable

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waste-heat boilers. Compare A. 102 (letter of August 3, 1977—standards apply only when 100% fossil fuel is used in the boilers) with A. 104-106 (letter of August 18, 1977—continuous operating and monitoring requirements imposed, with further monitoring and reporting requirements to be developed and put into effect regarding the sulfur content of the fuel used).

Moreover, EPA's Decision to impose *ad hoc* requirements contrasts sharply with its decision at the outset to subject the waste-heat boilers to the standards. PPG's special design and use of the waste-heat boilers as integral parts of the overall cogeneration system was completely ignored by EPA in its decision that the boilers were subject to the standards. See *infra*, at 9-10 & nn. 12-13.

[7] This factual summary is taken from the description set out by the court of appeals (587 F. 2d at 238-239, Pet. App. 2a-3a) and the record (A. 15-22, 27-29, 34-48, and 51-58) except as may be specifically noted.

[8] The General Electric gas turbines can also use oil of certain specifications as fuel. (A. 48.)

residual heat, in PPG's unit the gases are routed to the waste-heat boilers. There the heat in the exhaust gases, plus heat from firing supplemental fuel,[9] is used to generate high-temperature, high-pressure steam. Only then are the spent exhaust gases discharged to the atmosphere. The high-temperature, high-pressure steam produced by the waste-heat boilers is supplied to the steam turbogenerator to make electricity, and the resulting lower-temperature, reduced-pressure steam is used in chemical processing operations at the Lake Charles Works.[10] Similarly, the electricity generated by the gas

[9] This supplemental fuel can be either natural gas, fuel oil, or hydrogen.

[10] As the court of appeals said:

> This exhaust from the turbines contributes nearly 40% (approximately 371 million British thermal units per hour) of the total input to the waste heat boiler, while the remaining heat (approximately 598 million British thermal units per hour) is provided by combustion of fuel oil or natural gas. (587 F.2d at 239. Pet. App. 2a-3a.)

The heat from the turbine exhausts is sufficient by itself (*i.e.*, without heat from supplemental fuel) to make steam of medium pressure and temperature in the boilers. However, some supplemental fuel must be used in at least one of the two waste-heat boilers to generate steam of sufficiently high temperature and pressure so that the steam turbogenerator may be used to generate electricity. When no supplemental fuel is used in either of the boilers, the steam is not at a temperature or pressure sufficient to prevent the steam from condensing on the final blades of the steam turbogenerator. If the steam were allowed to condense on the blades, corrosion would set in and damage the turbine.

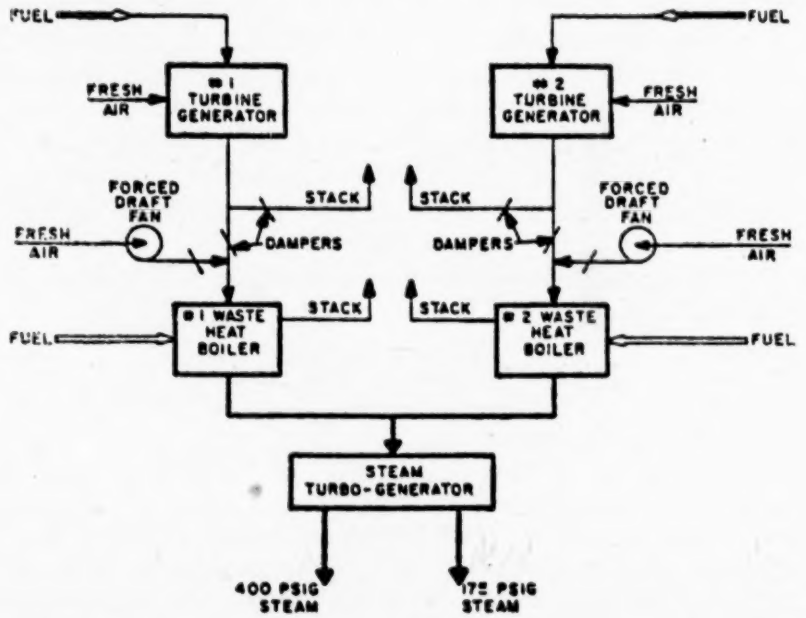
The entire system is controlled by computer, to allow the output of the coordinated components to be governed by the plant's needs. The key determinant is the plant's steam requirement. The turbogenerator is operated to pull off or extract the appropriate amount of steam for the plant. The electrical output of the turbogenerator varies accordingly, depending both upon the amount of steam ex-

turbines and the steam turbogenerator is entirely used at the Works. The energy savings are notable.[11]

The dispute over the applicability of the new source standards stems from two root causes. First, PPG began to construct the coordinated *unit* in 1970, well prior to August 17, 1971, the applicability date of the new source standard.[12] Second, EPA's new source standards do not

tracted for plant use and upon the amount of steam sent to the turbo-generator by the waste-heat boilers.

The following diagram represents the system (but does not show electrical output):



[11] The cogeneration aspects of the system save energy equivalent to 1 million barrels (42 million gallons) of oil per year.

[12] PPG completed plans for the system in 1970, and on November 11, 1970 entered into a contract with General Electric Co. for purchase of the two gas turbines and the turbogenerator. (A. 52, 54-58.) The purchase contract allowed PPG to cancel the contract without penalty on or before May 1, 1971. (A. 56.) The contract could be cancelled from that date to June 1, 1971, upon payment of a set fee. (*Id.*) PPG advised EPA in 1976 that:

> The purchase of the gas turbines and turbogenerators in 1970 represents a commitment of $9.4 million, covering two-thirds

refer to "waste heat" boilers and were not developed with cogeneration systems in mind.[13] In the standards, EPA did not take into account any of the particular air-emission control problems arising with such systems.

2. The record contains no explanation or factual support for EPA's determination to impose *ad hoc* requirements not found in its standards.

EPA's actions in the present case illustrate several of the difficulties in applying the current new source standards to cogeneration units, or more specifically to the boiler segment of such units. The record nonetheless contains no explanation by EPA or factual support for the Agency's *ad hoc* imposition of requirements not found in the standards.

In EPA's letter of June 8, 1977, which responded to PPG's request for a determination of applicability, the

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of the equipment purchased in the combined cycle power plant. (A. 52.)

EPA refused to consider the fact that the waste-heat boilers by design could not practically function except as part of the coordinated total unit. In a letter dated December 22, 1976, an official of EPA's Region VI stated:

> Even though you [PPG] may have ordered equipment [the steam turbogenerator] before the date of the proposed regulations that would be completely useless without the steam generators [the "waste heat" boilers] that action would be irrelevant to determine the applicability of the regulations to the two steam generators.
>
> We hope that this discussion makes it clear why the two steam generators are subject to the provisions of the Standards of Performance for New Stationary Sources, 40 C.F.R. Part 60. (A. 59.)

[13] As EPA's Director of Stationary Source Enforcement said in a memorandum to an official in EPA's Region VI Office,

> the Agency, when it established NSPS for fossil-fuel steam generators on December 23, 1971, had gathered data for *only* units which burn 100 percent fossil fuel. (A. 96 (emphasis in the original).)

Agency said the waste-heat boilers were subject to the standards because they were capable of operating without any waste-heat contribution (*i.e.*, with heat derived 100 percent from fuel burned in the boiler) at the requisite quantitative level for coverage (250 million British thermal units per hour). (A. 97.) This determination, however, did not focus on the ordinary mode of operation of the waste-heat boilers, where substantial heat is contributed by exhaust gases from the gas turbines. In normal operation, the boilers emit a stream of inextricably commingled air and pollutants stemming both from the gas turbines and from the fuel fired as a supplemental heat source in the boilers. Because the pollutants from these two sources cannot be segregated, the quantitative limits in the standards for emissions of particulate, sulfur dioxide, and nitrogen oxides could not be applied.

PPG's request for a clarification (A. 99-101) was answered by a letter dated August 3, 1977, in which EPA's Director of Stationary Source Enforcement stated that the standards would apply only during a performance test or other periods when the boilers were operating entirely using fossil fuel. (A. 102.)

This determination had a short life. On August 18, 1977, the Director by letter retracted the August 3rd determination and instead imposed specific requirements to be applicable to the operations of the waste-heat boilers at all times. (A. 104-106.) He stated that PPG was not required to install equipment for or conduct the continuous monitoring for sulfur dioxide (SO_2), nitrogen oxides (NO_x), or carbon monoxide (CO) mandated by the standards. Thus, when operated normally with heat derived from the turbine exhausts, the boilers would not be subject to the emission limits for those pollutants in the standards. However, PPG would be required at all times to burn in the boilers fuel which contained amounts of sulfur equal to or less than a sulfur

level to be specified as a result of performance tests conducted in compliance with the standards, when the boilers were operated with 100-percent fossil fuel (no waste-heat contribution). PPG would be required to install and operate continuous opacity monitors in the stacks of the waste-heat boilers (presumably to assess particulate emissions), and it would also be required to "perform some form of alternative monitoring" which could include a requirement to monitor and report on the sulfur content of any supplemental fossil fuel burned in the boilers. (A. 105.)

EPA thus did not actually apply the standards to the waste-heat boilers. Among other things, the standards themselves do not prescribe fuel requirements, nor do they authorize EPA officials to establish fuel requirements in particular cases. In effect, EPA imposed new, *ad hoc* requirements for the waste-heat boilers under the guise of applying the standards. Most importantly for present purposes, the record contains no evidence or information relating specifically to the requirements which were chosen.[14]

During the pendency of this litigation to review EPA's determinations, PPG has operated the waste-heat boilers

[14] As noted previously, the materials gathered by EPA to develop the new source standards similarly do not address emissions either from cogeneration units or from units burning waste materials (*e.g.*, bark, wood residues, or garbage) as well as fossil fuels. See *supra*, at 10, n.13. Since the standards were originally adopted in December 1971, EPA amended the standard to take into account blending of wood residue and fossil fuel, both during the performance tests and thereafter during operation. (A. 96.) In EPA's words, these amendments apply "to no other combination of fossil fuel and waste material" (*id.*), and certainly do not apply to "waste" hot gases. The exhaust gases from the turbines are not "burned" at all in the "waste heat" boilers. *Id.*

in compliance with requirements specified by EPA.[15] PPG nonetheless remains very concerned that reliable and economic low-sulfur fuel sources may not be available for use with the cogeneration system. PPG's fuel supplier, Conoco, in the last several months increasingly has exercised its contractual option to make fuel switches, as the letter reprinted in Appendix A, *infra*, illustrates.

SUMMARY OF ARGUMENT

The court of appeals correctly dismissed a "protective" petition for review filed by PPG regarding EPA's action in determining that the Agency's new source standards applied to "waste heat" boilers comprising part of a cogeneration power system at PPG's plant in Lake Charles, Louisiana. EPA's action was "final" and "locally and regionally applicable" within the meaning of Section 307(b)(1) of the Clean Air Act, but the Agency's action was not one of those specified with particularity in the Section. Jurisdiction in the court of appeals had to arise, if at all, from the "other final action" phrase added to the second sentence of Section 307(b)(1) by the

[15] PPG has complied with the standards largely by using natural gas as the supplemental fuel for the waste-heat boilers. As prescribed by the standards, performance tests with natural gas were carried out on the first waste-heat boiler on August 24, 1977 (App. 97), and on the second waste-heat boiler on May 3, 1979. Letter from James E. Wyche, III to Diana Dutton, Director, Enforcement Division, EPA Region VI (June 21, 1979). In each such test, the boilers met the requirements established by the standards and EPA's ruling of August 18, 1977.

Subsequently, PPG has notified EPA of the occasions when Conoco, the supplier of fuel to the Works under a requirements contract, has chosen to supply fuel oil rather than natural gas. An example of these notices (Letter from F. Ann Corbello to Diana Dutton, Director, Enforcement Division, EPA Region VI (December 3, 1979)), is reprinted *infra* as Appendix A to this brief.

Fuel oil of 0.7% sulfur content or less has been calculated to satisfy the requirements of EPA's letter ruling of August 18, 1977. Under otherwise applicable Louisiana regulations, the boilers would have to use fuel oil with a sulfur content of 1.0% or less.

Clean Air Act Amendments of 1977. The phrase will not support the expansive jurisdictional reach which EPA presses on this Court.

EPA insists that all final actions taken by the Agency, of any nature whatsoever, must be reviewed in courts of appeals under Section 307(b)(1). This very broad reading of the "other final action" phrases in the Section creates a direct conflict between those phrases and the other judicial review provisions in Section 307(b)(1) and elsewhere in the Act.

EPA's expansive reading would create the situation in which actions specifically excepted from review in courts of appeals because of a parenthetical exclusion in the first sentence of Section 307(b)(1) would be brought back into the ambit of review in courts of appeals by the general "other final action" phrase. Moreover, EPA's reading would nullify entirely the special judicial review provisions found separately in Section 206(b)(2)(B) of the Act. This Court should reject EPA's arguments and adopt the construction of Section 307(b)(1) which best reconciles these potentially conflicting provisions bearing on judicial review.

EPA also ignores completely the interpretation given to Section 307(b)(1) prior to the 1977 Amendments, and Congress' failure to indicate in any way that it wished to override this prior interpretation by enacting the Amendments. Indeed, Congress gave no signal of any kind that it wished to make the massive change in the Act's allocation of review jurisdiction between courts of appeals and district courts which would be the result of EPA's reading of the "other final action" phrases in Section 307(b)(1).

Prior to 1977, the courts of appeals uniformly construed Section 307(b)(1) such that jurisdiction to review EPA's actions in applying standards to particular

facilities rested with district courts rather than courts of appeals. *E.g.*, *Utah Power & Light Co.* v. *Environmental Protection Agency*, 553 F.2d 215 (D. C. Cir. 1977). The provisions in Section 307(b)(1) were strictly construed, and EPA's determinations regarding application of its regulations were not among the items specified in Section 307(b)(1) for review in courts of appeals.

As part of the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 776, Congress added several further explicitly enumerated actions to those subject to special review in courts of appeals. It also added the phrase "other final action" both to the first sentence of Section 307(b)(1) providing for review of nationally applicable actions in the D.C. Circuit and to the second sentence of Section 307(b)(1) providing for review of locally and regionally applicable actions in the U.S. Court of Appeals for the "appropriate" circuit. These changes were based upon recommendations of the Administrative Conference which were addressed to venue questions, not jurisdiction. Congress specifically stated it was not acting on the recommendations of the Administrative Conference relating to jurisdiction. Moreover, shortly thereafter, Congress enacted the Clean Air Act Technical and Conforming Amendments, Pub. L. No. 95-190, § 14, 91 Stat. 1393, 1399 (1977), in which a number of other actions were made specifically reviewable in courts of appeals. These "necessary" technical changes would not have been warranted if the "other final action" phrase was intended to reach the extraordinarily wide range of matters which EPA now urges it covers.

EPA's exhortations for an expansive reading also run afoul of the uniform line of decisions in the courts of appeals construing the special judicial-review provisions of the Clean Air Act "narrowly" and "strictly", just as the courts of appeals have similarly construed comparable provisions in the Clean Water Act and the Noise Control Act. Courts have been troubled by the harsh terms of

the coextensive review-preclusion clause found in Section 307(b)(2) of the Act, and comparable provisions in the other acts. See *Utah Power & Light Co.* v. *Environmental Protection Agency*, 553 F.2d 215, 219 n.19 (D.C. Cir. 1977); *Chrysler Corp.* v. *Environmental Protection Agency*, 600 F. 2d 904, 910 & n. 59, 914 (D.C. Cir. 1979). They have also been cognizant of the difficulty the courts of appeals have in reviewing agency decisions not taken on the basis of a definite and contemporaneously compiled administrative record. See *Crown Simpson Pulp Co.* v. *Costle*, 599 F.2d 897, 900 (9th Cir. 1979), *cert. pending*, No. 79-797.

EPA also would use the general "other final action" phrase to expand the reach of Section 307(b)(1) very greatly beyond the compass provided by those actions specifically enumerated in Section 307(b)(1) as subject to review in the courts of appeals. The enumerated actions call for action by EPA on the basis of a definite record stemming from administrative proceedings based at least on notice and an opportunity to comment. By contrast, many of the actions EPA would sweep into the special review provisions do not have to be and are not taken by EPA on the basis of a record but rather are taken very informally, perhaps only on the basis of correspondence as in the present case. In the circumstances, the rule of *ejusdem generis* should be applied, to limit the general "other final action" phrase to matters similar to those covered in the preceding enumerated references. See *Fitch Co.* v. *United States*, 323 U.S. 582, 585-586 (1945); *Smith* v. *Davis*, 323 U.S. 111, 116-117 (1944); *United States* v. *Salen*, 235 U.S. 237, 239 (1914); *United States* v. *Stever*, 222 U.S. 167, 174-175 (1911); *Bigelow* v. *Forrest*, 9 Wall. (76 U.S.) 339, 348-349 (1869). Compare *United States* v. *Powell*, 423 U.S. 87, 91, (1975); *United States* v. *Alpers*, 338 U.S. 680, 682 (1950).

EPA also denigrates the ability of district courts to review federal agency action. EPA's criticisms are misplaced, for both the courts of appeals and legal commentators have recognized that district courts are better suited than courts of appeals to deal with agency action taken on an ill-defined administrative record.

EPA's reading of the judicial review provisions of Section 307(b)(1) is so extreme that it would often prevent parties from obtaining judicial recourse from Agency action or from presenting every available defense in an enforcement suit. The judicial-review provisions necessarily carry with them the coextensive review-preclusion clause of Section 307(b)(2). Taken together as EPA would read them, these provisions would not afford to affected parties " a reasonable opportunity to be heard" as the due process clause of the fifth amendment to the Constittuion requires. *Yakus* v. *United States*, 321 U.S. 414, 433 (1944). The broad range of matters involving particular facilities or minor events which would be made subject to Section 307(b) by EPA's reading would not as a practical matter be carried by aggrieved parties to courts of appeals for review, even though no other opportunity for judicial oversight of the Agency's action would be available and review-preclusion would bar later defenses.

ARGUMENT

Introduction

EPA, PPG, and Conoco all agree that EPA's determinations in the letters of June and August 1977 are "final action" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 551(13). See EPA's Br. at 12-16. As such, EPA's action is subject to judicial review.[16]

[16] PPG and Conoco have never disputed the finality of EPA's action. Curiously, however, EPA takes up four full pages of its brief in arguing the "plain meaning" of "final action" in Section 307(b)(1). These arguments avoid rather than address the disputed portion of the statute. The question is not whether EPA's action here is "final" under traditional concepts of administrative law, but rather whether it is within the "*other* final action" contemplated by Congress in amending Section 307(b)(1).

Unless a special statutory provision prescribes the form of and terms for review, the Administrative Procedure Act [17] and the federal-question jurisdictional statute [18] provide the substantive and jurisdictional predicates for judicial review in federal district court. See, *e.g.*, *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-141 (1967).

There was no doubt prior to the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 776, that jurisdiction to review EPA's action in determining whether its new source standards were applicable to a particular facility would have rested with district courts. Such determinations were not among the actions specifically enumerated in Section 307(b)(1) as being reviewable exclusively in the courts of appeals. See *Utah Power & Light Co.* v. *Environmental Protection Agency*, 553 F.2d 215 (D.C. Cir. 1977) (Leventhal, J.); cf. *Chrysler Corp.* v. *Environmental Protection Agency*, 600 F.2d 904, 910 & n.59 (D.C. Cir. 1979) (ruling on jurisdiction to review actions under the Noise Control Act of 1972; that Act's review provisions are modeled on those of the Clean Air Act) (Robinson, J.). EPA urges that revisions to Section 307 made in the 1977 Amendments require a different result than that reached under the law as it stood prior to the Amendments.

The initial question in this case is thus whether the special review provisions in Section 307(b)(1) of the Act apply to EPA's determinations regarding the application of its regulations to particular facilities such as PPG's waste-heat boilers. Because EPA's action here is not among those listed with specificity in Section 307(b)(1), the action must be within the reach of the "other final action" phrase in order for the court of ap-

[17] 5 U.S.C. §§ 701-706.

[18] 28 U.S.C. § 1331(a). See *Califano* v. *Sanders*, 430 U.S. 99 (1977).

peals to have original and exclusive jurisdiction. Based upon an analysis of (1) the judicial review provisions in Sections 307 and 206 of the Act,[19] (2) the legislative history of these provisions, and (3) the reasoning of decisions of courts of appeals construing these provisions and comparable portions of other environmental regulatory acts, this Court should conclude that the special review provisions do not apply here and that review initially is to take place in the district courts rather than in the courts of appeals.

The coverage and scope of the special review provisions in Section 307(b)(1) are affected strongly by the coextensive review-preclusion language in Section 307(b)(2) of the Act. If this Court should construe the judicial-review provisions sufficiently expansively to embrace EPA's very informal determinations in the present case, then the Court must address the further question of whether the review provisions, given the accompanying review-preclusion language, contravene the due process clause of the fifth amendment.

I. JUDICIAL REVIEW OF EPA'S DETERMINATION THAT NEW SOURCE STANDARDS APPLY TO PPG'S WASTE-HEAT BOILERS IS NOT GOVERNED BY THE SPECIAL PROVISIONS OF SECTION 307(b)(1) OF THE ACT.

This Court has observed that statutes creating special review procedures "must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok* v. *Immigration & Naturalization Service*, 392 U.S. 206, 212 (1968). Application of this principle in the present case is made difficult by the inelegant way in which Congress has ex-

[19] Section 206 of the Act is codified at 42 U.S.C. § 7525. The special judicial review provisions of this Section are set out *infra*, at 22-23.

pressed itself and by EPA's singular focus on two phrases in the Act while ignoring completely other pertinent statutory provisions. This Court thus is faced with the task of adopting the construction of the special judicial-review provisions of Section 307(b)(1) which best reconciles potentially contradictory provisions.

A. The Statutory Language Regarding Judicial Review Is On Its Face Ambiguous and Potentially Contradictory.

The special judicial-review provisions of Sections 307 and 206 are ambiguous and open to a construction which introduces a conflict among them. Construed as EPA argues, Section 307 would nullify entirely the review provisions of Section 206. EPA would also have the general "other final action" phrase of Section 307 pull back within its coverage those actions specifically excepted by explicit parenthetical language in the Section. EPA's opening brief fails even to mention these ambiguities and potential contradictions.[20] The Court accordingly must exercise great care in construing the judicial review provisions to arrive at a reasoned interpretation of a poorly drawn statute.

The special judicial review provisions are chiefly found in Section 307. The provisions in Section 307 prescribing the scope and terms of review in courts of appeals are the first, second, and fourth sentences of paragraph 307(b)(1). In the following quotation, the language added by the 1977 Amendments is italicized, and that added by the subsequent Clean Air Act Technical and Conforming Amendments, Pub. L. No. 95-190, § 14(a)(79), (80), 91 Stat. 1404 (November 16, 1977), is shown in bolder type:

> (b)(1) A petition for review of action of the Administrator in promulgating any national primary

[20] EPA's brief does not cite Section 206 in any respect whatsoever.

> or secondary ambient air quality standard, any emission standard **or requirement** under section 112, any standard of performance **or requirement** under section 111, any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, any standard under section 231, *any rule issued under section* **113, 119 or** *120*, **or** *any other nationally applicable regulations promulgated, or final action taken*, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), *any order* **under section 111(j), under section 112(c), under section 113(d), under section 119, or** *under section 120*, or his action under section 119(c)(2)(A), (B), or (C) **(as in effect before the date of enactment of the Clean Air Act Amendments of 1977)** or under regulations thereunder, *or any other final action of the Administrator under this Act* **(including any denial or disapproval by the Administrator under title I)** *which is locally or regionally applicable* may be filed only in the United States Court of Appeals for the appropriate circuit. . . . Any petition *for review under this subsection* shall be filed within *sixty* days from the date *notice* of such promulgation, approval, or action *appears in the Federal Register*. . . .

When all provisions of paragraph 307(b)(1) are construed broadly, in accordance with EPA's contentions, the paragraph seems to turn itself inside out. The first sentence calls for review in the D.C. Circuit of "any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1))", yet EPA reads the language of "any other nationally applicable regulations promulgated, or final action taken" to bring the

parenthetically excluded standard-setting action of Section 202(b)(1) back into the reach of the sentence.

In all events, standing alone, the "any other . . . final action" clauses of both the first and second sentences are ambiguous. Section 307(b) does not specify whether the "other final action" being addressed has to be similar in nature to those actions specified with particularity.[21] Nor does it speak to whether the "other" action can be rule-making, adjudication, or both, or action taken upon an administrative record, or taken informally without recourse to a contemporaneously compiled record, or both.

Then too, subsection 307(e) provides:

> (e) *Nothing in this Act shall be construed to authorize judicial review of regulations or orders of the Administrator under this Act, except as provided in this section.*[22]

Subsection (e) is difficult to parse because it contains three cross-references respectively to "this Act," "this Act," and "this section." Arguably, it could be read to provide that of the provisions in the Act, only those in Section 307 can provide a basis for judicial review of regulations or orders of EPA issued under the Act. But see *infra*, at 42-43 n.40. Yet, Section 206(b)(2)(B)(ii) sets out a further specific provision for judicial review:

> (ii) In any case of actual controversy as to the validity of any determination under clause (i) [regarding whether proper tests were conducted to determine compliance with a manufacturer's certificate of conformity with motor-vehicle emission requirements], the manufacturer may at any time prior to the 60th day after such determination is made file a petition with the United States court of appeals for the circuit wherein such manufacturer resides or has his principal place of business for a judicial review of such determination. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Administrator or other officer designated by him for that purpose. The Administrator thereupon shall file in the court the record of the proceedings on which the Administrator based his determination, as provided in Section 2112 of title 28 of the United States Code.

[21] Both the legislative history and canons of statutory construction do bear on this question. See *infra*, at 24-40, 42, and 50.

[22] This text is italicized because the subsection was added by the 1977 Amendment. The legislative history of Subsection (e) is described, *infra*, at 42-43 n.40.

Moreover, as an additional matter, the special judicial-review provisions of Section 206(b)(2)(B)(ii) could conflict with those of Section 307(b)(1), depending upon the scope to be given to "other" actions under the latter section.

Looming over all of these statutory provisions is Section 307(b)(2), which precludes any subsequent review of an action which was or could have been reviewed under Section 307(b)(1). This harsh review-preclusion provision provides in its entirety:

> Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

Judge Leventhal's opinion for the court in *Utah Power & Light Co.* v. *Environmental Protection Agency, supra,* gave the review-preclusion provision considerable weight in adjudging the sweep of Section 307(b)(1). 553 F.2d at 218 n.14, 219 & nn.18 & 20. Cf. *Chrysler Corp.* v. *Environmental Protection Agency*, 600 F.2d 904, 912-914 & nn. 75-90 (D.C. Cir. 1979).

Because Section 307 is ambiguous and, on EPA's reading, contradictory, the inquiry must turn to Congress' intent in enacting the Section.

B. The Legislative History Of Section 307(b)(1) Evidences A Congressional Intent To Mandate Special Review In Courts Of Appeals Only For Action Under The Act Where A Definite And Contemporaneously Compiled Administrative Record Would Provide A Ready Basis For Review.

1. *The judicial-review provisions of the Clean Air Amendments of 1970.*

Section 307(b)(1) had its genesis in the Clean Air Amendments of 1970, Pub. L. No. 91-604, § 12(a), 84 Stat. 1676, 1707. Congress then established the basic statutory framework for Section 307(b)(1). As enacted in 1970, the second sentence of Section 307(b)(1) provided exclusive jurisdiction in the appropriate court of appeals for review of agency action taken under two sections of the Act, Sections 110 and 111(d), 42 U.S.C. §§ 1857c-5, 1857c-6(d) (1976). According to the Conference Report, Section 307(b)(1) was inserted by the Senate in its bill[23] to "specify forums for judicial review of *certain* actions of the [EPA]." H.R. Rep. No. 91-1783, 91st Cong., 2d Sess. (1970), *reprinted in A Legislative History of the Clean Air Amendments of 1970*, at 151, 207 (1974) (emphasis added). The conference committee also noted that the House bill did not contain a comparable provision. *Id.*

The Senate debate on S. 4358 indicates that the judicial-review provision contemplated appellate court review of those administrative actions taken after development of a contemporaneous administrative record containing all technical and other relevant information:

> I prefer the judicial review framework in the bill for I believe that *through the administrative process the [EPA] can develop on the record all of the technical and other relevant information necessary to achieve a sound judgment.* Similarly, and in accordance with general administrative law, *such decision of the [EPA], should be reviewable in the court of appeals* so that the interests of all parties can be fully protected. *With the record developed by the [EPA], the court, as an unbiased, independent institution, is the appropriate forum for reviewing such decision and making a judgment as to its quality.* The normal rules of the court also provide the greatest amount of insulation from the political pressures that will undoubtedly surround a judgment of this type. At the same time, judicial review provides for full procedural and substantive due process for all interested parties. I therefore recommend to the Senate that the provision in the bill be retained.
>
> I think the Committee on Public Works is to be commended for accompanying the stringent substantive provision regarding the air pollution control program with several procedural requirements and opportunities to clearly incorporate due process protection in the application of the proposed law. In three areas provision is made to seek relief from, or review of, administrative actions or the application of the statute. The first of these is a general judicial review provision so that administrative promulgations and decisions made pursuant to the [A]ct may be reviewed while maintaining the basic integrity of the [A]ct. In section 308 the committee recognizes that administrative actions will affect the interests of persons and that such actions should, [t]herefore, be reviewable.
>
> (116 Cong. Rec. 33117 (1970) (remarks of Senator Cooper), *reprinted* in Senate Comm. on Public Works, 93rd Cong., 2d Sess., *A Legislative History of the Clean Air Amendments of 1970*, at 285, 386 (1974) (emphasis added).)

The sections of the Act enumerated in the first and second sentences of Section 307(b)(1) required notice and an opportunity for public hearing before EPA could

[23] S. 4358, 91st Cong., 2d Sess., § 308 (1970).

take the action which would be subject to initial review in courts of appeals. See, e.g., Sections 110 and 111(d) of the then-extant Act, 42 U.S.C. §§ 1857c-5 and 1857c-6 (d) (1976). Moreover, agency action taken pursuant to these sections was subject to the Administrative Procedure Act, 5 U.S.C. § 553, and an administrative record was required to be developed on a contemporaneous basis. Thus, the Senate in adopting the judicial-review provision ensured that each section specifically enumerated in Section 307(b)(1) was one under which EPA's actions would be taken only following the development of a comprehensive administrative record.[24] This interpretation of

[24] The Senate Report accompanying S. 4358 also evinces an intent to provide judicial review in courts of appeals for actions taken on the basis of an explicit administrative record:

> One of the uncertainties in the existing Clean Air Act is the availability or opportunity for judicial review *of administratively developed and promulgated standards and regulations.* Moreover, the effect on the general program of a review itself is not clear.
>
> . . .
>
> The Committee does not intend by this language to provide a statutory provision that establishes administrative promulgations or decisions as conclusive and thereby effectively extinguishing the right of review. Rather, the presumption of correctness established is rebuttable by proof that the administrative promulgation or decision is not supported by a preponderance of its evidence. *It should also be noted that evidence regarding any exclusion or omission of relevant material from the administrative record may be adduced to challenge the sufficiency of the administrative record.*

(S. Rep. No. 91-1196, 91st Cong., 2d Sess. 40-41 (1970) *reprinted in* Senate Comm. on Public Works, 93rd Cong., 2d Sess., *A Legislative History of The Clean Air Amendments of 1970,* at 397, 440-41 (1974) (emphasis added).)

The language in the Senate report is premised on the assumption that the courts of appeals are the appropriate forums for review because a comprehensive record would be made available to them. Where such a record was available, there would be little need for further fact-finding or discovery to prove out the basis for the Agency's action, in contrast to the need for such steps where more informally taken administrative action was at issue.

Congressional intent would be consistent with the customary role of the courts of appeals in reviewing actions where factual issues had been resolved by the Agency on a contemporaneously compiled administrative record.

2. *The revision made by the Clean Air Act Amendments of 1977.*

The 1977 Amendments made two additions to the limited number of specified actions of the Administrator which are subject to initial review in the U.S. Court of Appeals for the D.C. Circuit.[25] In addition, they incorporated a reference in the first sentence of Section 307(b)(1) to "any other nationally applicable regulations, or final action taken, by the Administrator". Pub. L. No. 95-95, § 305(c)(1), 91 Stat. 776 (August 7, 1977). A similar reference was added to the second sentence of Section 307(b)(1) regarding review of locally or regionally applicable actions in the "appropriate" circuit. Pub. L. No. 95-95, § 305(c)(2), 91 Stat. 776 (August 7, 1977).

The legislative history for the addition of these phrases contains no suggestion that Congress desired to divest the district courts of any jurisdiction and to transfer jurisdiction instead to courts of appeals. Certainly nothing supports a broad or expansive reading of these clauses. While EPA avoids most of the legislative history, recourse to the language of the phrases standing alone could be read to refer to (1) only the actions under the specifically enumerated sections, or (2) actions of the Administrator taken under the enumerated sections, where he chose to give notice in the *Federal Register*, or (3) actions under the enumerated sections, plus indis-

[25] In the 1977 Amendments Congress added a reference to Section 120 of the Act, 42 U.S.C. § 7420, both to the first sentence of Section 307(b)(1) and to the second sentence of that Section. See EPA's Br. at 22 n.17 (second paragraph).

pensable review of other closely allied actions, or (4) actions under the enumerated sections plus actions beyond those covered by those sections where the action taken was analogous to that taken under the sections listed with particularity, or (5) *all* actions of whatever nature taken by the Administrator, even if not specifically listed or covered by analogy with an enumerated provision, whether or not he chose to give notice of the action in the *Federal Register*. Each of these interpretations, plus others, is conceivable under the language of the clauses. However, only optional interpretations (2), (3), and (4) above represent constructions of the phrases which can be reconciled with other judicial review provisions of the Section and the Act. Other optional interpretations, such as EPA's proffered interpretation (5) above, introduce conflict and contradiction into the statutory terms.

The legislative history conflicts with EPA's proffered extreme interpretation of Section 307(b)(1), *i.e.*, interpretation number (5) above. It is very unlikely that Congress would expand so radically the jurisdiction of the courts of appeals, and divest the district courts of jurisdiction, without some consideration and discussion in the legislative history.[26] More importantly, the only

[26] EPA attempts to generate a legislative history which supports its interpretation of Section 307(b)(1). In support of its argument, EPA relies upon an ill-fated judicial review provision in a 1976 House Committee bill, H.R. 10498, 94th Cong. 2d Sess. (1976). *See* EPA's Br. at 17. EPA invites the Court to infer that Congress subsequently abandoned the approach of specifying with particularity actions to be reviewed in courts of appeals. EPA posits that by adding the "other final action" clauses to Section 307(b)(1) as part of the Clean Air Act Amendments of 1977, Congress intended that *all* actions be reviewable in the courts of appeals. EPA's reliance on the 1976 House bill reaches much too far and obfuscates the history of Section 307(b)(1).

In H.R. 10498, the House Committee did attempt to add specifically enumerated items to the list of reviewable actions in Section 307(b)(1). EPA fails to point out that the bill passed in 1976 by the Senate had no comparable provision and that the judicial review

discussion of the amendment to Section 307(b)(1) adopted in 1977, found in the Report of the House Committee on Interstate and Foreign Commerce,[27] states that the Amendments were "intended to clarify some questions relating to *venue* for review of rules or orders under the [A]ct". H.R. Rep. No. 95-294, 95th Cong., 1st Sess., at 323, *reprinted in* [1977] U.S. Code Cong. & Ad. News 1077, 1402 (emphasis added). The complete text of the pertinent comments in the House report is as follows (the footnotes have been retained):[28]

> Subsection (c) of section 305 of the bill is *intended to clarify some questions relating to venue* for review of rules or orders under the act. Paragraph (1) of that subsection makes it clear that any nationally applicable regulations promulgated by the Administrator under the Clean Air Act could be reviewed only in the U.S. Court of Appeals for the District of Columbia. These would include, to mention but a few examples, regulations to carry out the nonattainment policy referred to in section 117 of this bill and regulations to effectuate motor vehicle assembly-line test provisions of section 206 of the act

provision of the House bill failed to survive consideration by the conference of differences in the 1976 House- and Senate-passed versions. *See* H.R. (Conf.) Rep. No. 94-1742, 94th Cong. 2d Sess. at 124-25 (1976). The Conference Committee gave no explanation for its deletion. *Id.* The 1976 bill then was not enacted by Congress. EPA espouses mere speculation in trying to read anything into this abortive legislative history.

[27] This amendatory language originated in the House. The explanatory portions of the Conference Report contain no reference to adoption of these provisions from the House bill. H.R. (Conf.) Rep. No. 95-564, 95th Cong. 1st Sess., at 177-178 (Conference Report), *reprinted in* [1977] U.S. Code Cong. & Ad. News, 1502, 1558-1559.

[28] EPA has presented a distorted picture of the House Committee's intent by omitting in the quotation in EPA's Br. at 20 all those parts of the House Report which make clear that this portion refers to venue rather than jurisdiction, *i.e.*, the first sentence of the first paragraph and the third, fourth, fifth, and sixth paragraphs of the pertinent material.

or inspection/maintenance requirements under section 208 of this bill.

Subsection (c)(2) of section 305 provides for essentially locally, statewide, or regionally applicable rules or orders to be reviewed in the U.S. court of appeals for the circuit in which such locality[,] State, or region is located. This provision applies, except as otherwise provided in paragraph (4), to the Administrator's action in approving or promulgating an implementation plan for any State.

On the other hand, if an action of the Administrator is found by him to be based on a determination of nationwide scope or effect (including a determination which has scope or effect beyond a single judicial circuit), then exclusive *venue* for review is in the U.S. Court of Appeals for the District of Columbia, under paragraph (4).

In adopting this subsection, the committee was in large measure approving the portion of the Administrative Conference of the United States recomendation section 305.76-4(A), that deals with venue.[10] The commitee's view also concurs, however, with the comments, concerns, and recommendation contained in item No. 1 of the separate statement of G. William Frick, which accompanied the Administrative Conference's views.[11]

Also, as indicated earlier, the committee bill incorporates recommendation D2 of the Administrative Conference on extending the period for petitoning for judicial review in the court of appeals.

However, in no event should these provisions be construed as endorsement of the remainder of the Administrative Conference's recommendations. Some of these recommendations, such as those contained in items B and C, were simply not considered by the committee. Others (such as the recommendations in D1 and D3[)] were rejected.[12]

[10] See 41 Fed. Reg. 56767-69 (December 30, 1976).

[11] *Id.* at 56768.

[12] See supra [sic] in this section for a discussion of the committee's views on item D3. On recommendation D3, largely for the reasons stated in the separate statement of G. William Frick, the committee oposed [sic] the Conference's recommendation. See also *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d [349] (3d Cir. 1972) [,(*cert. denied*, 409 U.S. 1125 (1973)]; *Lloyd A. Fry Roofing Co.* v. *EPA*, 415 F. Supp. 799 (W.D. Mo. 1976) [,*aff'd*, 554 F.2d 885 (8th Cir. 1977)].

(*Id.* at 323-324, [1977] U.S. Code Cong. & Ad. News, at 1402-1403) (emphasis added).)

The House report thus discusses the amendments to Section 307(b) as *venue* provisions. The Report addresses allocating review of administrative actions having only local or regional impact to the circuit where the impact is felt, while relegating review of administrative actions of nationwide scope or effect to the District of Columbia Circuit. This overriding concern is reinforced by the reference in the Report to "the portion of the Administrative Conference of the United States recommendation section 305.76-4(A), that deals with venue." *Id.* at 324, [1977] U.S. Code Cong. & Ad. News, at 1403 (footnote omitted).

The Administrative Conference of the United States recognized the distinction between the venue and jurisdiction provisions of Section 307(b)(1). Its recommendations completely severed the two. While Recommendation A was titled "Venue in the Courts of Appeals," Recommendation E was titled "Actions Subject to Court-of-Appeals Review" and proposed expanding the jurisdiction of the courts of appeals to include several additional specific agency actions which were reviewable in district courts. See 41 *Fed. Reg.* at 56768. Recom-

mendation A of the Administrative Conference, which is set out at 41 *Fed. Reg.* 56768 (December 30, 1976),[29] provides in pertinent part as follows:

> 3. Congress should amend section 307(b) of the Clean Air Act [42 U.S.C. § 1857h-5(b)] to make explicit that the Administrator's action in approving or promulgating state implementation plans is reviewable in the circuit containing the state whose plan is challenged. (Brackets in the original.)

Recommendation E on the other hand dealt specifically with a transfer of initial-review jurisdiction from district courts to courts of appeals. However, the House report expressly disavowed any endorsement of the Administrative Conference's recommendations other than Recommendation A. See *supra*, at 30-31 (quoted text accompanying n.12 of quote). Thus, Congress did not intend or attempt to expand the jurisdiction of the courts of appeals provided by the Act.[30]

Notably, the House Report mentions specifically that "[s]ome of these [the Administrative Conference's] recommendations, such as those contained in items B and C,

[29] The complete text of the Administrative Conference's recommendations is reprinted, *infra*, at Appendix B to this brief.

[30] Congressional selectivity in the approval of the Administrative Conference's recommendations was made evident by the contemporaneous deliberations on the Federal Water Pollution Control Act Amendments of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (the "Clean Water Act"). Among the *venue* recommendations of the Administrative Conference was the proposal to amend Section 509(b) of the Clean Water Act, 33 U.S.C. § 1369(b) to provide for centralized review of all national standards under the Clean Water Act in the Court of Appeals for the District of Columbia Circuit. 41 Fed. Reg. 56767, 56768 (December 30, 1976). Such an amendment was proposed by Senator Kennedy during the Senate's floor debate on the Clean Water Act of 1977. 123 Cong. Rec. S13598-13605 (daily ed. August 4, 1977). Despite the Administrative Conference's recommendation, the Senate declined by a substantial margin (59-36) to adopt the amendment. *Id.* at 13604, 13605.

were simply not considered by the [House] committee." *Id.* Recommendation B is captioned "Choice between District Court and Court of Appeals for Review", and Recommendation C is captioned "Limitation of Non-Statutory Review." (1 C.F.R. § 305.76-4, Recommendations B, C; Appendix B, *infra*, at 8a-9a.)

Moreover in Recommendation E, the Administrative Conference made one explicit suggestion for a change in the actions subject to review in courts of appeals under Section 307(b)(1). Recommendation E.2 proposed a revision of Section 307(b)(1) to shift review jurisdiction from district courts to courts of appeals for new-car emission standards only:

> 2. Congress should amend the Clean Air Act to make those new-car emission standards not now reviewable under section 307(b) [42 U.S.C. § 1857h-5(b)], reviewable in the courts of appeals.
>
> (1 C.F.R. § 305.76-4, Recommendation E.2.; Appendix B, *infra* at 10a (brackets in original).)

Recommendation E.2. was among those which the House Committee said it had not considered. See *supra*, at 30-31. The Recommendation refers to the parenthetical exclusion in Section 307(b)(1) (first sentence), which provides for review in the D.C. Circuit of "any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1))". Congress left this language intact in 1977. The resulting potential inconsistency in the Section, which would arise with adoption of EPA's expansive construction of the "other final action" clause, has been discussed *supra*, at 20-23.

The intent of the Administrative Conference is unmistakable. Professor Currie had prepared a report for the Conference which served as the basis for comments by interested persons and then for the deliberations of

the Conference itself. His report has been reprinted as an article in the *Iowa Law Review*: Currie, *Judicial Review Under Federal Pollution Laws*, 62 Iowa L. Rev. 1221, 1225 n.37 (1977). The report contains a section specifically addressing the parenthetical exclusion in Section 307(b)(1) for a "standard required to be prescribed under section 202(b)(1)."[31] See *id.* at 1228-1229. Professor Currie observed that:

> Two alternative inferences may be drawn from this exception, since it clearly is not an accident: that the excepted standards are reviewable under general federal law in the district courts, or that they are not reviewable at all.

(*Id.* at 1228.)

Upon analysis, Professor Currie determined that there were several areas of possible dispute regarding the excepted emission standards. Because of the constitutional implications of completely precluding review, and because Congress had not shown the requisite clear and convincing intent to block judicial review of the potential disputes, he concluded that review in the federal district courts under general federal law was available for the excepted standard-setting action. *Id.* at 1228-1229. Nonetheless, he saw no apparent reason why review should take place in district courts rather than the circuit courts. *Id.* at 1228. The Administrative Conference obviously agreed. Despite these urgings Congress did not act to remove the exception.

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[31] Section 202(b)(1) then as now called on EPA to prescribe emission standards for hydrocarbons, carbon monoxide, and nitrogen oxides from "light-duty vehicles".

The 1977 Amendments added language to Section 202(b)(1) requiring EPA also to prescribe (1) substitute emission standards for NO_x applicable to cars built by small manufacturers, and (2) test-procedure regulations for measuring evaporative emissions of hydrocarbons. See *infra*, at 41.

A slightly different situation is presented by two provisions of the Clean Air Act which, prior to the 1977 Amendments, had provided an express and explicit mechanism for judicial review, separate and apart from Section 307(b)(1). The first of these provisions was in Section 110(f) of the then-extant Act, 42 U.S.C. § 1857c-5(f)(B) (1976), which provided for review of determinations respecting state applications for postponement of implementation plan requirements in "the United States court of appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person." The House initiated changes to Section 110(f)[32] which among other things deleted the special review provision.[33] No explanation was offered for making the deletion. The changes, including the deletion, were adopted as part of the 1977 Amendments. The special review provision previously in Section 110(f) of the Act consequently has been removed.

The other special review provision was (and still is) found in Section 206(b)(2)(B)(ii), 42 U.S.C. § 7525(b)(2)(B)(ii). This provision, like that previously in Section 110(f), was added by the 1970 Amendments to the Act. It authorizes review of determinations respecting suspension or revocation of motor vehicle compliance certificates upon petition by "the manufacturer" in "the

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[32] The Section is now codified at 42 U.S.C. § 7410(f).

[33] The pertinent portion of the 1977 Amendments is found at Pub. L. No. 95-95, §§ 107, 108, 91 Stat. 691, 693 (1977).

These amendments to Section 110(f) originated in H.R. 6161, § 115, 95th Cong. 1st Sess. (1977). Neither the discussions of this provision in the House Committee Report, H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 12-13, 202-03 (1977), nor in the Conference Report, H.R. (Conf.) Rep. No. 95-564, 95th Cong. 1st Sess. 125 (1977), disclose the reasons for deleting the special judicial review provision previously in Section 110(f).

United States court of appeals for the circuit wherein such manufacturer resides or has his principal place of business" in "any case of actual controversy as to the validity of [such] determination."[34] Congress did not amend this provision in any respect in 1977. It left it intact. Congress presumably was aware of this provision when it adopted the 1977 Amendments,[35] and nowhere in the legislative history is there any suggestion that the review contemplated by Section 206(b)(2)(B)(ii) is in any respect inconsistent with that prescribed in Section 307(b)(1).

Finally, the preamble to the Administrative Conference's recommendations noted that the actions reviewable by courts of appeals under Section 307(b)(1) had certain common characteristics:

> Not every action of the EPA under the Clean Air Act . . . is made reviewable in the courts of appeals. *Some of the omissions* appear to be inconsistent with *the general statutory plan*, and corrective amendments are desirable.
>
> (41 Fed. Reg. at 56768 (emphasis added).)

Substantively, the Administrative Conference was, of course, referring to Recommendation E, which was not adopted by Congress. Nonetheless, the Conference recognized the existence of a "general statutory plan". It also pointed to one common characteristic, shared by each section enumerated in Section 307(b)(1) (pre-1977 Amendments) as to which review was to be had in courts of

[34] The full text of this provision is set out *supra*, at 22-23.

[35] Professor Currie had noted the existence of review provisions in Sections 110(f) and 206(b)(2)(B)(ii) in his report for the Administrative Conference. See 62 Lowa L. Rev. at 1223 n.31. Congress seemingly had Professor Currie's report available to it, because the House Committee specifically referred to then-EPA General Counsel Frick's comments on the report and the Administrative Conference's action. See *supra*, at 30.

appeals. That common element was that each of the specified actions of the Administrator had to be taken in compliance with the Administrative Procedure Act and thus would have been taken upon a complete and contemporaneously compiled administrative record.[36]

In the 1977 Amendments, Congress made changes in Section 307 which emphasized its insistence upon a definite and contemporaneously compiled record to support particular rulemaking actions by EPA. A new Section was added which established procedural requirements for the actions explicitly enumerated in Section 307(d)(1)(A)-(M). The procedural requirements set out in Section 307(d) are more stringent than, and displace, those of the Administrative Procedure Act.[37] As one might ex-

[36] This was so except for the then-existing reference to Section 119(c)(2)(A), (B), and (C). See 42 U.S.C. § 1857h-5(b) (1976), referring to 42 U.S.C. §§ 1857c-10(c)(2)(A), (B), and (C).

[37] In a recent decision, the D.C. Circuit explained the new requirements as follows:

> The purpose of the amendments [adding Section 307(d)] was to facilitate judicial review by defining "what the record for a rule consists of, and how and when material must be placed in the record." H.R. Rep. No. 294, 95th Cong., 1st Sess. 318, 319 (1977). The statute requires the inclusion of some materials, and the exclusion of others, so that the record for judicial review will comprise only those materials directly pertinent to the agency's decision. In summary, it requires the EPA to compile a docket on or before the date a proposed rule is published in the Federal Register. The materials in the docket must be open to public inspection until the final rule is promulgated, and with one exception, they become the record for judicial review after such promulgation. The docket must include the proposed rule, a statement of its basis and purpose (including a summary of the factual data on which the proposed rule is based, the methodology used with the respect to those data, and the major legal interpretations and policy considerations underlying the rule), all comments written by the public and submitted during the comment period, a transcript of any public hearing on the proposed rule, the text of the final rule, a statement of the basis and purposes of the final rule, an explanation of major changes from the proposed rule, and a

pect, a number of the rulemaking actions specified for special judicial review in the first sentence of Section 307 (b) (1) are also specified for particular administrative procedures in Section 307 (d) (1).

Accordingly, in the 1977 Amendments Congress built on and confirmed its intent expressed in connection with the 1970 Amendments that judicial review in courts of appeals take place on a definite and contemporaneously compiled administrative record. Congress in 1977 added Section 307 (d) to place on EPA the obligation to base certain of its decisions upon just such a record. Of greatest importance here is the fact that Congress expressed *no intent* to expand the scope of Section 307 (b) (1) to transfer to courts of appeals review of actions other than those taken by EPA within the bounds of a definite record.

3. *The consequent technical amendments adopted in November 1977.*

The Clean Air Act Technical and Conforming Amendments of 1977, Pub. L. No. 95-190, § 14, 91 Stat. 1393, 1399, made a number of further revisions to the Clean Air Act. Included in these technical amendments was the addition of several enumerated sections to both the first and second sentences of Section 307 (b) (1).[38] The legislative history behind these technical amendments is sparse. A Summary and Statement of Intent was inserted in the Congressional Record, and in pertinent part states that Congress was adding provisions calling for review in courts of appeals of particular actions:

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response to every major comment, criticism, and new datum submitted during the comment period.

American Petroleum Institute v. *Costle*, No. 79-1104, slip opinion at 4-5 (D.C. Cir. November 6, 1979) (footnote omitted).

[38] Pub. L. No. 95-190, § 14(a)(79) and (80), 91 Stat. at 1404.

> (79) and (80) Implements conference agreement to make clear that judicial review is available for new provisions, as well as old, dealing with hazardous emissions standards and new sources and other requirements and for delayed compliance orders and penalties and smelter orders. Also implements conference agreement providing for review of grant or denial of locally applicable orders in the appropriate circuit court, and review of nationally applicable regulations in the D.C. Circuit Court.
>
> (123 Cong. Rec. H. 11,956 (daily ed. November 1, 1977) *reprinted in* [1977] U.S. Code Cong. & Ad. News 3661, 3666.)

Also, on the Senate floor, Senator Byrd of West Virginia offered a statement by Senator Muskie (who was absent from the Senate debate due to illness) which "explain[ed] these amendments." 123 Cong. Rec. S18372 (daily ed. November 1, 1977). In the explanation Senator Muskie assured the Senate that "[it] is not the purpose of these amendments to re-open substantive issues in the Clean Air Act." *Id.* He also stated that only "necessary" technical amendments were being made:

> All of the comments of the Environmental Protection Agency and private citizens have been reviewed by the Committee staff. Many have been rejected because they attempt to raise policy issues. *Only those amendments that are necessary to correct technical errors or unclear phrases have been retained in the package of amendments* that is now before the Senate.
>
> Members of the Environment and Public Works Committee have examined these amendments. If there were any questions about the legitimacy of an amendment, it was dropped from the list. (*Id.* (emphasis added).)

The technical amendments accordingly demonstrate that less than three months after adding the "other final ac-

tion" clauses to Section 307(b)(1), Congress felt compelled to specify several additional sections of the Act in the judicial-review provision. If Congress had intended the "other final action" clause to confer exclusive jurisdiction on the courts of appeals to review every final action of the Administrator, the technical amendments would not have been necessary.

C. EPA's Extreme Interpretation Would Nullify Provisions Of Section 307, As Well As Provisions Of Section 206.

1. *EPA's proffered interpretation would create an internal conflict in the terms of the first sentence of Section 307(b)(1).*

EPA's expansive interpretation of Section 307(b)(1) cannot be correct. It would create an internal conflict in the terms of the first sentence of Section 307(b)(1). As previously discussed, a portion of the first sentence specifies that among the actions explicitly subject to review in the D.C. Circuit is "any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1))." If the "other . . . final action taken" clause in the first sentence of Section 307(b)(1) were interpreted as EPA here asserts, the foregoing parenthetical clause excepting certain standards under Section 202 would be nullified or effectively elided from the statute. The specifically excepted standards would be drawn back within the coverage of the special review provisions by the tag-end general clause. This was definitely not Congress' intent, as illustrated by the House Committee's explicit statement that it was not acting on the Administrative Conference's Recommendation E.2. proposing deletion of the exception from Section 307(b)(1).

EPA has elsewhere tried to evade the logical thrust of Congress' failure to remove the exception by arguing

that the emissions standards issued under Section 202(b)(1) are statutorily established. EPA asserted that its action in actually issuing such standards is only ministerial in nature and need not be subject to any review. Defendant's Reply Brief In Support of Its Motion to Dismiss, at 20, *Rubber Manufacturers Association* v. *Costle*, Civil Action No. 79-189 (D. Del.). This argument is discredited by the contrary analysis in Professor Currie's report to the Administrative Conference, evidently available also to Congress, on this precise point. See *supra*, at 33-34.

Moreover, EPA's argument also is negated by Congress' amendments in 1977 to Section 202(b)(1). In addition to the emission standards previously required to be prescribed under that provision, the 1977 Amendments required EPA to issue two further types of standards under Section 202(b)(1). Subparagraph (b)(1)(B) authorizes the Administrator to issue *substitute* emission standards for oxides of nitrogen for certain small manufacturers, *i.e.*,

> for any light-duty vehicle manufactured during model years 1981 and 1982 by any manufacturer whose production, by corporate identity, for calendar year 1976 was less than three hundred thousand light-duty vehicles if the Administrator [makes certain determinations].

Then also, subparagraph (b)(1)(C) requires EPA to issue regulations providing that the test procedures for "evaporative emissions of hydrocarbons" shall measure emissions "from the vehicle or engine as a whole." [39]

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[39] Like the emission standards, these further standards are also "required to be prescribed" under Section 202(b)(1). Regarding the substitute standards for nitrogen oxides, the statute states expressly that the "Administrator *shall prescribe* [those] standards." Section 202(b)(1)(B) (emphasis added). Regarding the regulations governing test procedures for evaporative emissions,

2. *EPA also asks this court to elide completely Section 206(b)(2)(B)(ii), (iii) and (iv) from the Act.*

The prior discussion shows that under EPA's expansive reading of the two "other final action" clauses of Section 307(b)(1), the special review provisions in Section 206(b)(2)(B)(ii), (iii) and (iv) would be nullified completely. See *supra*, at 22-23. Congress gave no indication whatsoever that it intended such a result. See *supra*, at 35-36. The 1977 technical amendments were designed to deal with such inconsistencies and conflicts created in the Act by the 1977 Amendments. See *supra*, at 38-39. And indeed, Congress amended the review provisions of Section 307(b)(1) to add further enumerated actions without dealing in any way with the separate review provisions of Section 206(b)(2)(B). See *supra*, at 38-40. Senator Muskie's explanatory statement of the technical amendments (quoted *supra*, at 39.), reports that EPA made numerous suggestions for changes, and that the pertinent congressional committees had adopted those changes which were "necessary." *Id.* Repeals by implication are not favored, and this principle of statutory construction carries especial weight when the Court is urged to find that a specific provision such as Section 206(b)(2)(B) has been repealed by more general provisions such as the "other final action" clauses in Section 307(b)(1). *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 168-169 (1976). See also *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 189-190 (1978).[40]

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the statute states: "Regulations to carry out this subparagraph [202(b)(1)(C)] *shall be promulgated* not later than two hundred and seventy days after the date of enactment of this subparagraph." Section 202(b)(1)(C) (emphasis added).

[40] EPA, however, essentially mounts a double-barrelled attack on the jurisdictional provision of Section 206(b)(2)(B). In addition to the nullifying effect of its expansive construction of Section 307(b)(1), EPA's proffered interpretation of Section 307(e) would also have the effect of negating Section 206(b)(2)(B). Again, EPA's arguments reach too far. Properly construed, Section 307(e) does not bear on Section 206(b)(2)(B) at all.

Section 307(e) is the portion of the statute which speaks of the authority in the Act for judicial review of EPA's orders and regulations adopted under the Act. See *supra*, at 22. EPA says the subsection "reinforces a congressional intention to place judicial review of all final agency decisions in the courts of appeals." EPA's Br. at 22 n.17. This assertion has utterly no support. The subsection itself does not purport to affect any review measures except those set out in the Act. The basis for review in district courts stems from general statutes (the Administrative Procedure Act and the federal-question jurisdictional statute) which obviously are not part of the Clean Air Act.

Moreover, EPA's assertions based on Subsection 307(e) fail for another equally fundamental reason. Subsection 307(e) was added to the Act by Section 303 of the 1977 Amendments, Pub. L. No. 95-95, § 303(d), 91 Stat. 685, 772. That section of the 1977 Amendments was captioned "Citizen Suits" (*id.* at 771), and chiefly made various revisions to Section 304 of the Act, as amended, 42 U.S.C. § 7604, which authorizes such citizen suits. Section 307(e) of the Act was added by the last provision of Section 303 of the 1977 Amendments. In contrast, the amendments to the judicial review provisions of Section 307(b)(1) of the Act were made by Section 305 of the 1977 Amendments, which section was captioned "Administrative Procedures and Judicial Review." Pub. L. No. 95-95, § 305, 91 Stat. 685, 772-777. Thus, the placement in the Amendments of the provision adding Section 307(e) is very instructive, and shows that Congress was trying to forestall use of citizen suits brought under Section 304 of the Act as an alternative means to obtain judicial review of regulations and orders otherwise subject to review under Section 307(b)(1) of the Act.

Under the Act as it stood prior to the 1977 Amendments, the question had arisen whether there could be concurrent jurisdiction in the court of appeals and the district court when EPA had acted, but where a "citizen" alleged that the action had not gone far enough in an area where EPA was under a statutory duty to act. See, *e.g. Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654, 661 n.9 (D.C. Cir. 1975) (Wright, J.) (suggesting concurrent jurisdiction). See Currie, *Judicial Review Under Federal Pollution Laws*, 62 Iowa L. Rev. 1221, 1247-49 & n.216 (1977). By adopting Section 307(e) of the Act as part of the amendments regarding citizen suits, Congress was rejecting the suggestion in the *Oljato* case and providing that review under the judicial-review provision should oust jurisdiction under the citizen-suit provision.

In sum, as properly construed, Section 307(e) of the Act does not bear on, let alone nullify, the special review provisions separately placed in Section 206(b)(2)(B) of the Act.

D. By Rejecting EPA's Exhortations For An Expansive Reading Of Section 307(b)(1), The Court Of Appeals Construed The Statute In Accord With Decisions By Other Courts Of Appeals.

In putting forward its arguments, EPA notably fails to cite any decisions by the courts of appeals construing judicial-review provisions of this and comparable statutes. The omission is for good reason—the decisions of the courts of appeals uniformly support the reasoning and approach of the Fifth Circuit.

1. The courts of appeals have carefully avoided making any expansive interpretations of the special judicial-review provisions in the Clean Air Act, the Clean Water Act, and the Noise Control Act, despite EPA's efforts.

Courts of appeals have "narrowly" or "strictly construed" the similar judicial-review jurisdictional provisions found in the Clean Air Act, the Clean Water Act, and the Noise Control Act. See, *e.g.*, *Utah Power & Light Co.* v. *Environmental Protection Agency*, 553 F.2d 215, 219 n.19 (D.C. Cir. 1977) (Clean Air Act—construed "narrowly") (Leventhal, J.); *Crown Simpson Pulp Co.* v. *Costle*, 599 F.2d 897, 900 (9th Cir. 1979) (Clean Water Act—"strictly construed") (Duniway, J.), *cert. pending*, No. 79-797; *Chrysler Corp.* v. *Environmental Protection Agency*, 600 F.2d 904, 914 (D.C. Cir. 1979) (adopting a "strictly limited" and "narrow interpretation" of the comparable provision of the Noise Control Act) (Robinson, J.). In these cases, the courts of appeals dismissed petitions for review of actions on the ground that the actions at issue were not covered by the special provisions of the acts calling for review in the courts of appeals.[41]

[41] Judicial review was to be had in district courts under the federal question statute, 28 U.S.C. § 1331(a), and the Administrative Procedure Act, 5 U.S.C. §§ 701-706. See *Califano* v. *Sanders*, 430 U.S. 99 (1977); *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 607-608 n.6 (1978).

The courts of appeals have cited two particular grounds for narrowly construing judicial-review provisions calling for initial jurisdiction in courts of appeals. First, administrative records of actions taken by an agency on an informal basis can be sketchy or virtually non-existent; they thus provide no effective basis for review. See *Crown Simpson Pulp Co.* v. *Costle*, *supra*, 599 F.2d at 904.[42] Second, the Clean Air Act, the Clean Water Act, and the Noise Control Act all contain review-preclusion provisions which bar any subsequent review of

[42] The court in *Crown Simpson* compared on this ground the prior decision in *Washington* v. *Environmental Protection Agency (Scott Paper)*, 573 F.2d 583 (9th Cir. 1978), with the ruling in *Ford Motor Co.* v. *Environmental Protection Agency*, 567 F.2d 661 (6th Cir. 1977).

Use of the nature of the record available for review as a factor in construing the judicial review provisions of a statute is consistent with a number of decisions by courts of appeals. For example, in *Investment Company Institute* v. *Board of Governors of the Federal Reserve System*, 551 F.2d 1270 (D.C. Cir. 1977), the court of appeals construed the Bank Holding Company Act to provide for review of a rulemaking order under a special judicial-review provision addressed to "orders." *Id.* at 1278. A substantial eight-volume record of informal rulemaking was available. *Id.* The court distinguished *United Gas Pipe Line Co.* v. *Federal Power Commission*, 181 F.2d 796 (D.C. Cir.), *cert. denied*, 340 U.S. 827 (1950), in which the court of appeals refused to review regulations promulgated after informal rulemaking on the ground that the available record did not fully encompass the issues. The *United Gas Pipe Line* decision probably is not viable insofar as it refuses to recognize that *some* administrative record is available even where an agency's decision is *not* required to be based on a definite record. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971). But the type of record available for review should be a factor in construing statutory provisions governing *where* (in courts of appeals or district courts) review should be had initially. See Currie and Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev. 1, 54-61 (1975).

an action by EPA that is reviewable in a court of appeals under the judicial-review provisions of those Acts. These are harsh provisions, and the constitutionality of the provisions is in question as the D.C. Circuit noted in *Chrysler Corp.* v. *Environmental Protection Agency* (the court's footnotes have been included):

> [T]he Supreme Court has suggested that the constitutional validity of the preclusive review provision of the Clean Air Act Amendments merits serious consideration.[80] Although, in *Yakus* v. *United States*[81] the Court sustained the constitutionality of a similar provision in the Emergency Price Control Act of 1942,[82] that holding may be distinguishable on the ground that the *Yakus* provision was a "war emergency measure."[83] *The nagging presence of a substantial due process question indicates, then, at the very least, the propriety of a narrow interpretation of Section 16(a) [the judicial-review provision of the Noise Control Act].*

[80] See *Adamo Wrecking Co.* v. *United States*, *supra* note 59, 434 U.S. at 289, 98 S.Ct. at 575, 54 L.Ed.2d at 551 (concurring opinion) ("[i]f the constitutional validity of § 307(b) of the Clean Air Act had been raised by petitioner, I think it would have merited serious consideration"); see *Utah Power & Light Co.* v. *EPA*, *supra* note 57, 180 U.S. App. D.C. at 74 n.19, 553 F.2d at 219 n.19 ("[r]ecent judicial opinions have tended to construe [the preclusive review provision of the Clean Air Act] narrowly").

[81] 321 U.S. 414, 64 S.Ct. 860, 88 L.Ed. 834 (1944).

[82] § 204, 56 Stat. 23 (1942), 50 U.S.C.App. § 924 (Supp. II[)] (1942), as amended by the Inflation Control Act of 1942, 56 Stat. 765 (1942), 50 U.S.C.App. § 961 *et seq.* (Supp. II[)] (1942).

[83] 434 U.S. at 290, 98 S.Ct. at 575, 54 L.Ed.2d at 551 (concurring opinion).

(600 F.2d at 913 (emphasis added).)

In short, EPA has pressed on a number of courts "an expansive reading" of the jurisdictional provisions of

the Clean Air Act, the Clean Water Act, the Noise Control Act. See *Chrysler Corp.* v. *Environmental Protection Agency*, *supra*, 600 F.2d at 911. Courts have rebuffed these efforts by EPA, even where the private parties also joined the Agency in such jurisdictional contentions. See, *e.g.*, *Crown Simpson Pulp Co.* v. *Costle*, *supra*, 599 F.2d at 900. This Court similarly should reject EPA's argument for the broadest possible interpretation of Section 307(b)(1) (see *supra*, at 27-28), and in doing so, uphold the wisdom and results of a number of years' experience of the courts of appeals with comparable cases.[43]

2. *Other decisions by courts of appeals construing the amended Section 307(b)(1) are consistent with the Fifth Circuit's decision in the present case.*

In the present case the Fifth Circuit attempted to determine what type of action was within the "any other final action" language of the statute by reference to the legislative history of the 1977 amendments. However, the legislative history spoke only of *venue* for review, not jurisdiction. (See 587 F.2d at 243 n.6, Pet. App. 15a-16a.) As the Fifth Circuit observed, the legislative history "complete[ly] fail[s] to mention what EPA asserts was a massive shift in jurisdiction to the courts of appeals." (*Id.* at 243 (footnote omitted), Pet. App. 15a.)[44]

[43] This Court previously has pointed to "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals." *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.26 (1977).

[44] As a matter of statutory construction, this Court also has presumed that Congress would not make a similarly important change in settled statutory law without stating its intent expressly and in words which could not be misunderstood. See *Takao Ozawa* v. *United States*, 260 U.S. 178, 194 (1922); *Thompson* v. *United States*, 246 U.S. 547, 551 (1918). This is especially true insofar as judicial procedure is concerned. Compare *Mitchum* v. *Foster*,

The court accordingly turned to other aids to statutory construction. It concluded that the amended statutory provisions must be read in light of the limited ability of a court of appeals to develop facts, a limitation recognized by Congress when it framed the Act's judicial-review jurisdiction provisions in 1970.[45] In the court's view the determination regarding jurisdiction should reflect the capability provided a district court to call into play discovery procedures to compile and verify the basis for the Agency's decision where a contemporaneous administrative record had not been maintained.

Other courts of appeals have construed Section 307 (b) (1) in a manner consistent with this ruling. In *United States Steel Corp.* v. *Environmental Protection Agency*, 595 F.2d 207 (5th Cir. 1979), the petitioners filed for review of EPA's action in promulgating regulations designating areas in Alabama as nonattainment areas for suspended particulates. The court found that it had jurisdiction under Section 307(b) (1) of the Act to review the agency action. 595 F.2d at 212. It distinguished this decision from its prior decision in the *PPG* case on the basis of the type of agency action taken and the resulting administrative records involved in each case. The court noted that the record in the *PPG* case consisted solely of exchanged correspondence.[46]

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407 U.S. 225, 236 n.21 (1972), and *Ex Parte Collett*, 337 U.S. 55, 68, 70-71 (1949), with *United States* v. *Sisson*, 399 U.S. 267, 292-293 n.22 (1970).

[45] See the discussion *supra*, at 45 n.42, regarding the nature of the record available for review as a useful factor in construing the special judicial-review provisions of a statute.

[46] Because there was a substantial record in the *U.S. Steel* case, derived from a rulemaking proceeding, the court found that the considerations that gave rise to the result in the *PPG* case were absent. 595 F.2d at 212. The court explicitly acknowledged the difference in the nature of the two actions. In the *PPG* case EPA had determined that a certain regulation was applicable to a specific plant, while in the *U.S. Steel* case EPA had promulgated regulations having a general effect in the specified areas. *Id.*

Similarly, in *Sharon Steel Corp.* v. *Environmental Protection Agency*, 597 F.2d 377 (3d Cir. 1979), steel-company petitioners sought review of a final rule issued by EPA embodying the determination that four areas of Pennsylvania were nonattainment areas for suspended particulates. The Third Circuit briefly discussed the jurisdictional issue, and in doing so, distinguished the case before it from the Fifth Circuit's prior decision in the *PPG* case on grounds similar to those set out in the Fifth Circuit's *U.S. Steel* decision. See 597 F.2d at 379 n.3. The Third Circuit took the position that the *PPG* case was not applicable in the case before it because EPA in its case had taken action which the Agency had denominated as rulemaking subject to 5 U.S.C. § 553. The court opined that the *PPG* case stood for the proposition that Section 307(b) did not give jurisdiction to courts of appeals to review the interpretation and application of regulations, where the Agency was acting on an informal basis. *Id.*

Consequently, in the three cases reported to date interpreting the "other . . . final action" clause of Section 307(b) (1), the courts of appeals have reached decisions which provide a reasoned and practical conceptual basis for deciding which of the many types of "other actions" are properly to be reviewed in courts of appeals and which are to be reviewed in district courts. If an action taken by EPA was necessarily based upon a record provided by an adjudicatory or a rulemaking proceeding, then the action would be reviewed in the courts of appeals. If the action reflects informal proceedings not taken on the basis of a contemporaneously compiled administrative record, such as the informal adjudication in the present case, then district courts must undertake the task of review. This is precisely the result advocated as a general matter by two distinguished commentators. See Currie and Goodman, *Judicial Review Of Federal*

Administrative Action: Quest For The Optimum Forum, 75 Colum. L. Rev. 1, 54-61 (1975).

Such a construction of the "other final action" clause would give effect to Congress' intent in adopting the special judicial-review provisions as part of the 1970 Amendments to the Act. See *supra*, at 24-27. The actions listed with specificity in Section 307(b)(1), and thus specially subject to review in the courts of appeals, all must be based on administrative proceedings reflecting at least notice and an opportunity for hearing. See *supra*, at 26 & n.24, 37 & n.36, and *infra*, at 53 & n.48. The only arguable exception relates to action under Section 112(c) regarding hazardous pollutants (see *infra*, at 53 & n.48), which was added to the list by Congress without explanation as part of the 1977 technical amendments. See *supra*, at 20-21, 38. In the circumstances, the rule of *ejusdem generis* should be applied to limit the general "other final action" phrase to reach only matters similar to those covered by the preceding specifically enumerated references. Application of the rule of *ejusdem generis* here would serve Congress' intent in enacting Section 307(b)(1) to provide a special route for judicial review in courts of appeals for enumerated actions taken on a contemporaneously compiled administrative record. See *Fitch Co.* v. *United States*, 323 U.S. 582, 585-586 (1945); *Smith* v. *Davis*, 323 U.S. 111, 116-117 (1944); *United States* v. *Salen*, 235 U.S. 237, 249 (1914); *United Steves* v. *Stever*, 222 U.S. 167, 174-175 (1911); *Bigelow* v. *Forrest*, 9 Wall. (76 U.S.) 339, 348-349 (1869). Compare *United States* v. *Powell*, 423 U.S. 87, 90-91 (1975); *United States* v. *Alpers*, 338 U.S. 680, 682-684 (1950).

This construction would also best accord with Congress' intent *not* to act in the 1977 Amendments on the Administrative Conference's recommendations regarding specific changes in the allocation of jurisdiction between courts of appeals and district courts. See *supra*, at 29-33. Moreover, it would preserve the special judicial-review

provision in Section 206(b)(2)(B) of the Act, and the parenthetical exclusion in Section 307(b)(1) for action by EPA to establish emission standards and to prescribe other regulations under Section 202(b)(1) of the Act. The "other" actions of Section 307(b)(1) would not include actions under Section 206(b)(2)(B) or Section 202(b)(1).[47]

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[47] This construction of Section 307(b)(1) would also give effect to the House Committee's expressed intent that certain nationally applicable regulations be reviewed in the D.C. Circuit under the provisions of the first sentence of Section 307(b)(1). The three specific examples cited by the House Committee (see *supra*, at 29-30 (first quoted paragraph)) each related to regulations which would have had to be adopted in compliance either with the Administrative Procedure Act, 5 U.S.C. § 553, or with the more stringent procedural requirements of Section 307(d) of the Act. The first example refered to regulations promulgated under Part D (Sections 171-178) of the Act, 42 U.S.C. §§ 7501-7508, to implement the statutory requirements for nonattainment areas (*i.e.*, areas where air quality does not meet national ambient air quality standards). The second example concerned regulations to carry out a program for testing emissions of motor vehicles coming off assembly lines. The statutory basis for such regulations is Section 206(b)(1) of the Act, 42 U.S.C. § 7525(b)(1). Congress was aware of regulations already adopted by EPA on this subject, and wanted EPA to develop revised regulations. See H.R. (Conf.) Rep. No. 95-564, 95th Cong., 1st Sess., at 171 (1977). The final example pertained to regulations to implement a proposed mandatory program for inspection and maintenance of light duty vehicles to insure that the vehicles were complying with emissions standards. See H.R. 6161, 95th Cong., 1st Sess., § 208 (1977); H.R. Rep. No. 95-294, 95th Cong., 1st Sess., at 20-21 (1977). This portion of the House bill was retained in the version passed by the House, but it was deleted in the conference committee and consequently was not enacted. See H.R. (Conf.) Rep. No. 95-564, 95th Cong., 1st Sess., at 162-172 (1977).

Importantly, a full administrative record would have been available in each of the three rulemaking instances cited by the House Committee. Notably also, the reference by the House Committee to review of regulations establishing a program for testing emissions of motor vehicles coming off assembly lines conspicuously omits any reference to review of the *application* of such regulations to any particular instance. The omission is understandable. Review of the *application* of such regulations is governed by the special judicial-review provisions set out in Section 206(b)(2)(B) of the Act.

Several other interpretations of Section 307(b)(1) are available which also do less violence both to the words of the Section and to Congress' intent in adopting it than EPA's broad reading does. In *Utah Power & Light Co.* v. *Environmental Protection Agency*, 553 F.2d 215 (D.C. Cir. 1977), Judge Leventhal's opinion for the court held that an action by EPA in applying new source standards was reviewable in a district court and not in the court of appeals, because the action in applying (as contrasted to setting) the standards was not enumerated specifically in Section 307(b)(1). In adopting the 1977 Amendments and the 1977 technical amendments, Congress expressed no intent to overturn this holding. It thus continues to be viable as a possible reading of the statute.

Also, in *Chrysler Corp.* v. *Environmental Protection Agency*, 600 F.2d 904 (D.C. Cir. 1979), the court's opinion notes prior suggestions that actions closely related to those specifically enumerated might also be reviewed in courts of appeals, especially where the related action was taken on the same record or on a record very similar to that of an enumerated action. *Id.*, 600 F.2d at 910 & n.56. This jurisdictional argument has been raised before, but not decided by, this court in *E.I. du Pont de Nemours & Co.* v *.Train*, 430 U.S. 112, 125 n.14 (1977). Nonetheless, the phrase "other final action" in Section 307(b)(1) could be read to accord with these suggestions.

3. *EPA's criticism of review in district courts is mistaken and misplaced.*

The thrust of EPA's arguments is directed toward advocacy of an expansive reading of Section 307(b)(1), such that the review-preclusion clause would also be broadly applicable. However, EPA also criticizes review in the district courts. The Agency offers five separate objections, none of which withstand evaluation.

First, despite EPA's contrary assertion, the record in this case is skeletal, as the court of appeals found. See *supra*, at 5-6. Compare EPA's Br. at 24.

Second, EPA says the record in the present case is similar to that which would be developed during EPA's actions under Section 111(j) and 112(c) of the Act, 42 U.S.C. §§ 7411(j), 7412(c), both of which sections are listed with particularity in the second sentence of Section 307(b)(1). See EPA's Br. at 24. The references to both Sections 111(j) and 112(c) were added by the 1977 technical amendments. See Clean Air Act Technical and Conforming Amendments, Pub. L. No. 95-190, § 14(a)(80), 91 Stat. 1393, 1404. Accordingly, there is no effective legislative history for the additions. See *supra*, at 38-40. Moreover, EPA's assertions as to record similarity are patently wrong insofar as actions taken under Section 111(j) are concerned. Section 111(j) calls on the Administrator of EPA to make specific findings regarding whether a waiver from the requirements of new source standards should be granted "to encourage the use of an innovative technological system" to reduce emissions. Section 111(j)(1)(A), as amended, 42 U.S.C. § 7411(j)(1)(A). The statute expressly requires these determinations to be made "after notice and opportunity for public hearings." *Id.* Therefore, a contemporaneously compiled administrative record would be available for court of appeals review and must form the basis of a determination by the Administrator under this section. Compare EPA's Br. at 15 n.11.

Section 112(c) is somewhat different. It calls for several types of actions by the Administrator which must reflect statutorily specified findings.[48] Although, unlike

[48] Subparagraph 112(c)(1)(A) allows a person to construct a new source or modify an existing source which will emit hazardous pollutants only where "the Administrator finds that such source

Section 111(j), nothing is said in Section 112(c) about prior notice and an opportunity for a hearing, this Section does emphasize the necessity for certain factual findings by EPA. These findings presumably must be made with the aid of an administrative record sufficient to support them. Otherwise, a court of appeals would not be able to carry out its review. Section 112 focuses entirely on "hazardous air pollutants", and one can only conclude that Congress wanted special review because of the nature of the pollutants involved. Congress elsewhere has made exceptional provisions applicable where such hazardous pollutants are involved. See *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 282-283 (1978).

Third, EPA claims that the discovery procedures available in district courts would not advance judicial review. EPA's Br. at 24. This contention does not square with the experiences of courts or of private litigants. Contrary to EPA's implications, discovery in district courts is not available to develop a *new* record for review, but rather to compile and verify the information and contentions which were before the agency at the time of the decision. In short, discovery serves the purpose of verifying the contemporaneous record, where the agency itself has not kept a current docket of materials and may not have had any intention of basing its decision only on

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if properly operated will not cause emissions in violation of [a hazardous air emission] standard."

Subparagraph 112(c)(1)(B) provides that a source may not emit air pollutants in violation of standards issued under Section 112. When taken together with Section 113(a)(3), as amended, 42 U.S.C. § 7413(a)(3), Subparagraph 112(c)(1)(B) authorizes EPA to issue remedial administrative orders regarding such violations.

Subparagraph 112(c)(1)(B)(ii) authorizes the Administrator to grant a waiver of up to two years to comply with a hazardous air emission standard where he finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment.

items in a discrete record.[49] Discovery for this purpose is entirely consistent with *Federal Power Commission* v. *Transcontinental Gas Pipeline Co.*, 423 U.S. 326, 331 (1976); *Camp* v. *Pitts*, 411 U.S. 138, 141-143 (1973); and *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971).[50]

Discovery also serves the very important purpose of allowing a factual record to be developed regarding "ripeness" claims and other similar contentions by agencies urging dismissal of review actions. A district court could assess the hardship to the parties of granting or denying immediate review by taking evidence on the impact of the challenged rule. A court of appeals might be able to address this question on the basis of affidavits. However, affidavits often cannot be obtained and only the compulsory discovery processes of the district courts are capable of supplying needed facts.[51] Congress dealt

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[49] Moreover, as the Fifth Circuit has stated in a prior decision, "[r]emand to the agency for a statement of reasons for its decision would risk after the fact rationalization, which the evidence gathering powers of a trial court can more easily penetrate." *Save the Bay, Inc.* v. *Administrator of Environmental Protection Agency*, 556 F.2d 1282, 1292 (5th Cir. 1977) (citation omitted).

This Court has also observed that the agency's response to a remand by a reviewing court for formal findings or an adequate explanation "will, to some extent, be a '*post hoc* rationalization' and thus must be viewed critically." *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971).

[50] In fact, the district court before which the companion case to the present one is pending rejected EPA's Motion For a Protective Order barring discovery, and ordered EPA to respond to interrogatories directed solely to identifying materials available to EPA at the time it made its determinations regarding the waste-heat boilers. *PPG Industries, Inc.* v. *Costle*, Civil Action No. 771271 (W.D. La.) (order dated May 22, 1979, denying EPA's motion for a protective order).

[51] The utility of the compulsory discovery processes available to district courts became evident in *Rubber Manufacturers Ass'n* v. *Costle*, Civil Action No. 79-189 (D. Del. filed April 17, 1979). In that action twelve rubber companies sought review in the district court of EPA's action in issuing a "Control Technique Guideline"

with this problem in the Administrative Orders Review Act by allowing a court of appeals to remand to a district court for a hearing on the disputed question. See 28 U.S.C. § 2347(b)(3). A reviewing court of appeals acting under Section 307(b)(1) of the Clean Air Act does not have that option.[52]

Fourth, EPA argues that judicial review in courts of appeals would give rise to more prompt, definitive rulings than review in district courts. See EPA's Br. at 24-25. This contention contradicts explicit conclusions of the court of appeals in the present case. The Fifth Circuit feared that courts of appeals generally would not be able to provide prompt review, and suggested that delayed review would be costly and prejudicial to the parties:

> At this level [*i.e.*, the court of appeals], only after hearing, which may be long delayed because of other calendar commitments, can it be known whether the record is sufficient for review purposes. An insufficient record may necessitate a remand for fact-finding and record completion and a second court appearance, often before other judges, long delayed.

(587 F.2d at 245, Pet. App. 20a.)

The Fifth Circuit is notable for the long delays (currently approximately 3 years) between the completion of briefing in a case and the date of argument. The present case was heard promptly only because the Fifth Circuit granted PPG's motion to expedite argument.[53] Other circuits such as the Ninth Circuit are substantially in arrears in hearing argument in "ready" cases. Commentators have recognized that, from the viewpoint of those responsible for or concerned with court administration, the time of a circuit judge is a scarce resource which ought to be allocated wisely. See Administrative Conference Recommendations 1975, 1 C.F.R. § 305.75-3 (Recommendation No. 75-3, ¶ g). See also Currie and Goodman, *Judicial Review of Federal Administrative Action: Quest For The Optimum Forum*, 75 Colum. L. Rev. 1, 18-19, 24-25 (1975). EPA's reading of the "other final action" phrases of Section 307(b)(1) would require that many minor matters be litigated in the courts of appeals as an original matter, or review would be foreclosed entirely. See *supra*, at 3-4 n.2. In short, as a general matter the district courts offer opportunities for more prompt adjudication than do the courts of appeals, and the expenditures of judicial resources in obtaining a decision are considerably reduced. This is especially so in a case such as the present one, where PPG had no choice but to file its "protective" petitions for review in the Fifth Circuit where action on pending matters is long-delayed because of the court's backlog of pending cases. The Fifth Circuit was the "appropriate" circuit under Section 307(b)(1) because the facilities at issue were located in Lake Charles, Louisiana.

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for emissions of volatile organic compounds from tire manufacturing plants. The plaintiff companies contended that EPA was giving the Guideline the effect of a binding rule by taking a number of steps to insure that States incorporated it into revisions of their State Implementation Plans. EPA moved to dismiss the action in district court, contending among other things that its action in issuing the Guideline was not ripe for review. Affidavits could not be obtained from State officials. Three officials of States were, however, deposed, giving testimony regarding the steps by which EPA was seeking to secure incorporation of the Guideline into State Implementation Plans as a regulatory requirement, and also regarding the impact of these steps and the Guideline on States and regulated parties. Briefing of EPA's motion to dismiss, and of cross-motions by the parties for summary judgment has been completed, and a hearing on the several motions was held on November 19, 1979. No decision has been rendered to date.

Obviously a court of appeals is not able to provide procedures comparable to those used in the *Rubber Manufacturers* case to develop facts needed to resolve a dispute over justiciability.

[52] Similar evidentiary problems arise in connection with proceedings on a motion for stay in a court of appeals. In contrast, a motion for preliminary injunction in a district court often involves the taking of testimonial evidence.

[53] Argument could not be expedited in many cases of this nature in the courts of appeals or the courts' dockets would be disrupted. Moreover, simply presenting motions to expedite requires additional time of the circuit judges which could better be spent working on the merits of pending cases.

EPA's contention also presupposes that the losing party in a district court action will always take an appeal to the circuit court. This assumption is erroneous. Numerous environmental cases in district courts do not engender appeals. The parties, presumably, will obtain a reasoned decision from the district court, and, in practice, often appear to be satisfied at that point. Even EPA for example did not press an appeal from the district court's decision adverse to it in *Manufacturing Chemists Ass'n* v. *Costle*, 455 F.Supp. 968 (W.D. La. 1978), which certainly involved questions of broad applicability and importance. As commentators have said: "Two-tier review [involving an appeal from a district court decision] means greater expenses and delay for those litigants who persevere to the appellate stage but lesser expense to the 90 percent who do not." Currie and Goodman, *supra*, 62 Colum. L. Rev. at 25. Compare EPA's Br. at 26-27 n.20.[54]

Fifth, EPA notes that review in district court would not be available respecting actions by the Agency which are not "final", just as review in such a case would be unavailable in a court of appeals. See EPA's Br. at 26. PPG and Conoco agree. This observation is irrelevant to the issues involved here. In this case, PPG has sought review of a "final" action in district court, not action which is preliminary or otherwise not final. EPA errs in trying to read into the decision of the court an "assumption" that review of non-final actions would ordinarily be available in district courts. Compare EPA's Br. at 26, with 587 F.2d at 242, Pet. App. 11a.

In sum, just as EPA has erred in urging an expansive reading of Section 307(b)(1), the Agency has also put forward mistaken and misplaced policy criticisms of review in district courts.

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[54] In particular the district court offers a convenient forum for resolution of a locally applicable action, which is more likely to involve determinations made by EPA on an informal, non-record basis.

II. IF EXPANSIVELY CONSTRUED, THE REVIEW PROVISIONS OF SECTION 307(b) RELATING TO "OTHER FINAL ACTION" WOULD VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Section 307(b) places sharp limitations on the power of the lower federal courts to entertain fact-based, statutory, or even constitutional claims pertaining to certain actions by EPA. Those actions by the Agency which are subject to review under strict time constraints in courts of appeals under the terms of Section 307(b)(1) cannot subsequently be raised or presented as a defense in civil or criminal cases for enforcement. See Section 307(b)(2).

This Court has recognized Congress' power under article III of the Constitution to restrict the jurisdiction of lower federal courts. See *Lockerty* v. *Phillips*, 319 U.S. 182, 187-188 (1943). Also, this Court has ruled that, at least in emergency war-time conditions, "restricting judicial review of [an] administrative determination to a single court[,] . . . *so long as it affords to those affected a reasonable opportunity to be heard and present evidence*, does not offend against due process". *Yakus* v. *United States*, 321 U.S. 414, 433 (1944) (emphasis added) (citations omitted).

The juxtaposed paragraphs of Section 307(b) do not, however, afford the "reasonable opportunity to be heard" which due process requires, at least when the "other final action" clauses of Section 307(b)(1) are construed as expansively as EPA urges. See *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972); *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932). If one accepts for purposes of argument the Agency's construction of Section 307(b)(1), then many, very informally taken actions would be brought within the coverage of the special and limited review provisions of that Section. Like the determina-

tions in the present case, these actions would be "final" in nature and thus subject to some review. But they would have been taken without benefit of any hearing or other proceeding. Furthermore, the Agency's decision-maker typically would not have been constrained by any need to confine consideration to materials in a contemporaneously compiled administrative record. Indeed, the rationale for the agency decision may not even be specified.[55] See, *e.g.*, *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971). In these circumstances, nothing inherent in the nature of the action taken suggests to the person affected that failure to seek prompt review will result in being forever foreclosed from obtaining review. Moreover, the notice given by the Agency regarding the action may not suffice to convey a warning regarding the sharply limited opportunity for review.[56] The "other final action" phrases of Section 307(b)(1) do not by themselves provide a sufficient warning. In short, for every informal actions such as the one at issue in this litigation, "a reasonable opportunity to be heard" will not be present as a practical mater. As EPA would construe it, Section 307(b) fails to provide due process.

Moreover, Congress has made no finding of any compelling need for such limited and constrained review. This Court's decision in *Yakus* v. *United States*, 321 U.S. 414 (1944), upholding limited opportunities for review, may be sustainable as an exercise of the war powers of Congress and the President found in Article I, § 8 and

[55] In the present case EPA did not specify its rationale for the determination as to what requirements actually would be applied to the waste-heat boilers. See *supra*, at 10-12.

[56] The Agency observes that it does not always, or perhaps even usually, publish notice in the *Federal Register* that it has taken action. See EPA's Br. at 26. Where notice is not published in the *Federal Register*, as none was in this case, the Agency *now* states that it construes this circumstance to toll the running of the sixty-day period for seeking review specified in Section 307(b)(1).

Article II, § 2 of the Constitution. However, the present circumstances are quite different. Other administrative agencies with comparable responsibilities function without such limitations on the reviewability of their actions. The Occupational Safety and Health Administration ("OSHA") is an example.[57]

Finally, the expansive reading which EPA would give Section 307(b)(1) produces such a complicated and convoluted review and enforcement mechanism that an aggrieved party's claim could be simply lost in a shuttle among courts. The damage to affected parties is graphically illustrated where, as here, EPA has not given notice in the *Federal Register* that it has informally taken a final action under the Act. Given the nature of these informal actions, this lapse is understandable. EPA reads Section 307(b) such that the 60-day limitation on review is tolled until notice actually is published in the *Federal Register*, which event may never take place. See EPA's Br. at 26 n.19.[58] Nevertheless, if EPA subsequently brings an enforcement action against the affected party,

[57] Judicial review of OSHA's orders issuing regulations and standards is available directly in the courts of appeals under the special terms of Section 6(f) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(f). *E.g. Industrial Union Department* v. *American Petroleum Institute*, Nos. 78-911 and 78-1036. Review of standards is also available at the enforcement stage. See *Atlantic & Gulf Stevedores, Inc.* v. *Occupational Safety & Health Review Commission*, 435 F.2d 541, 550-551 (3d Cir. 1976).

[58] PPG's and Conoco's due process claim also relates to the absence of statutory standards for EPA's decision whether or not to publish notice in the *Federal Register* that it has taken action. At least under EPA's sweeping views of its powers under the statute, its own standard-bereft decision regarding notice governs the jurisdiction of federal courts. In PPG's and Conoco's view, Congress could not transfer its power under article III, section 1 of the Constitution to prescribe the jurisdiction of the lower federal courts to EPA, at least by a delegation of powers bereft of standards. See *Sibbach* v. *Wilson*, 312 U.S. 1, 9-10 (1941); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 421 (1935). See also Brief for Petitioner in the court of appeals, at 40-46.

Section 113 requires that the enforcement proceedings be initiated in a district court. Because of the operation of the review-preclusion clause, Section 307(b)(2), the district court could not entertain any defenses based upon the asserted invalidity of the agency action being enforced. Assuming that EPA does not then change its now-stated position on the tolling of the 60-day limitation in Section 307(b)(1), a concurrent petition for review of the underlying agency action could then be brought in a court of appeals. The affected party would have to ask the district court to stay its hand in the enforcement case pending action by the court of appeals on the petition for review. EPA would have no contemporaneously compiled record to certify to the court of appeals for its review. Presumably therefore, the Agency would have to try to reconstruct the record, perhaps years after the action had been taken on an informal basis. Where the court of appeals could not meaningfully review the Agency's action, it probably would have no choice but to remand to EPA for an explication of its action. After the proceedings before the Agency on remand had taken place (these proceedings surely would be colored by the enforcement action still pending in district court), the record would go back to the court of appeals for further review.[59] After new proceedings in the court of appeals and decision by that court, the results would then be available to be inserted as binding law in the district court enforcement action. By the time the proceedings would have reached this stage, the parties would be exhausted, the courts exasperated, and the environment unchanged (except perhaps by the passage of years). Only the Agency presumably would be pleased.

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[59] The Agency's action on remand would be a *post hoc* rationalization which would have to be carefully examined by the reviewing court. See *supra*, at 54 n.49.

This entire convoluted scenario is neither necessary nor inevitable. It would arise only if this Court accepts the Agency's expansive reading of Section 307(b)(1). The scenario does illustrate graphically why parties affected by informal Agency action as a practical matter would be denied the opportunity to seek judicial review of that action or the opportunity to present otherwise available defenses. Constructed as EPA urges, Section 307(b) would offend the due process clause.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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December 22, 1979

Appendices

APPENDIX A

PPG INDUSTRIES
PPG INDUSTRIES, INC.
INDUSTRIAL CHEMICAL DIVISION
P.O. Box 1000
Lake Charles, La. 70601

December 3, 1979

Ms. Diana Dutton, Director
Enforcement Division
U.S. Environmental Protection Agency
1201 Elm Street
Dallas, TX 75270

Re: Waste Heat Steam Generator —
Change of Fuel

Dear Ms. Dutton:

This is to notify your office of a change of fuel oil on our waste heat boiler No. 2 at Powerhouse C, PPG Industries, Inc. Lake Charles facility. The natural gas supply was interrupted by the supplier and replaced by 0.7 wt. % sulfur fuel oil. The duration of the fuel oil use was from 10:00 a.m., November 30 to 6:00 p.m., December 1, 1979.

Very truly yours,

/s/ F. Anne Corbello
F. ANNE CORBELLO
Environmental Control Assistant

FAC:as

cc: Mr. J. F. Coerver
Louisiana Air Control Commission
(re: State Permit No. 473)

bcc: R. J. Samelson
V. P. Wynne
C. Lettow
W. J. Peard/J. E. Wyche
H. Hank
E. L. Cook/D. Heffer

APPENDIX B

41 Fed. Reg. 56767-56769 (December 30, 1976):

Title 1—General Provisions

CHAPTER III—ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

PART 305—RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

PART 310—MISCELLANEOUS STATEMENTS

Miscellaneous Amendments

The Administrative Conference of the United States was established by the Administrative Conference Act, 5 U.S.C. 571-576, to study the efficiency, adequacy and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and to make recommendations for improvement to administrative agencies, collectively or individually, to the President, Congress, and the Judicial Conference of the United States (5 U.S.C. 574(1)).

The Administrative Conference of the United States at its Fifteenth Plenary Session, held December 9-10, 1976, adopted two Recommendations and one formal Statement. Recommendation 76-4 recommends amendments to the judicial review provisions of the Clean Air Act and Federal Water Pollution Control Act. Recommendation 76-5 urges Federal agencies normally to employ pre-adoption or post-adoption comment procedures when promulgating an interpretive rule of general applicability or statement of general policy. The Conference Statement is addressed to procedures to deal with an emergency shortage of natural gas.

1. The table of contents to Part 305 of Title 1, Chapter III, CFR is amended to add the following sections:

Sec.

305.76-4 Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act (Recommendation No. 76-4)

304.76-5 Interpretive Rules of General Applicability and Statements of General Policy (Recommendation No. 76-5)

2. Section 305.76-4 is added to Part 305 to read as follows:

§ 305.76-4 Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act (Recommendation No. 76-4).

(a) The Congress has enacted provisions for judicial review in the Clean Air Act and the Federal Water Pollution Control Act (FWPCA) that are in some respects inconsistent, incomplete, ambiguous and unsound.

(b) Courts have sometimes felt constrained to stretch these statutes to achieve sensible results. In other instances, courts seem to have ignored sensible general congressional direction in an attempt to do justice in particular cases. On yet other occasions courts have felt compelled by unclear provisions to reach undesirable results that Congress probably did not intend.

(c) Experience under the two Acts has highlighted a variety of problems in the interpretation and application of the judicial review provisions, all of which are likely to be addressed by Congress in the near future.

(d) This series of recommendations urges that, when Congress reconsiders the judicial review provisions of the principal pollution statutes, it rationalize, alter and clarify them, guided especially by the principle that juris-

dictional provisions should draw bright lines to minimize the waste and expense of litigation over whether a case has been brought in the right court. One recommendation is addressed to the Judicial Conference and calls upon the courts, pending congressional action to clarify their powers, to utilize their discretion to transfer judicial review proceedings where transfer will avoid undue duplication of litigation.

More specifically, the Conference has in view these considerations:

1. Section 509(b) of the FWPCA provides that all standards promulgated under it by the Environmental Protection Agency, including national standards, are to be reviewed in the United States Court of Appeals for a circuit in which the petitioner resides or transacts business. Under Section 307(b) of the Clean Air Act, on the other hand, certain nationally applicable standards are to be reviewed only in the Court of Appeals for the District of Columbia Circuit, but the EPA's actions in approving or promulgating state implementation plans are reviewable only "in the United States Court of Appeals for the appropriate circuit." Thus the FWPCA provides for a decentralized review of national standards, whereas the Clean Air Act requires that analogous standards be reviewed only in the D.C. Circuit. This inconsistency in approach should be resolved; the advantages of expeditious and authoritative review of all national standards in the D.C. Circuit suggests that it is the FWPCA's venue provision which should be amended. All national standards under the FWPCA should be made reviewable in the D.C. Circuit. Review of all other regulations, standards and determinations that are reviewable in the courts of appeals under the FWPCA should be in the circuit containing the affected state or facility. These amendments would entirely supplant the present provisions for review in the circuit in which the petitioner resides or transacts business.

The Clean Air Act's specification of "appropriate circuit" as the venue for review of state implementation plan approvals has also created uncertainties, especially when several plan approvals are challenged on identical grounds. Although a perfect resolution is impossible, an amendment, clarifying that the appropriate circuit is the one containing the state whose plan is challenged, would eliminate much of the prospect of threshold litigation over the question of which is the appropriate circuit, and would also avoid the splitting of cases into two different forums whenever local and national issues are present in the same case. The possibility of undue duplication of proceedings that might result can be met by increasing the flexibility of available transfer provisions to remove doubts about the authority of any court of appeals to transfer a case to any other court of appeals.

2. Section 304 of the Clean Air Act and Section 505 of the FWPCA authorize citizen suits in the district courts to require the EPA Administrator to perform "any act or duty under this Act which is not discretionary." Some district courts have accepted jurisdiction under Section 304 over cases that amount to challenges to the Administrator's approval and promulgation of state implementation plans, despite the provision of Section 307 for exclusive jurisdiction in the courts of appeals to review such action. The citizen-suit provisions should not furnish an alternative or premature method of review of questions that can be raised by direct review of the EPA's actions in the courts of appeals.

The proper scope of the present citizen-suit provisions is especially unclear in the context of standard-setting, where the line between failure to act and failure to act properly is dim. The difficulty of drawing such a distinction is ample reason for giving the courts of appeals

exclusive jurisdiction of actions to compel or to postpone the issuance of regulations whose validity would properly be determined in a court of appeals. It is recognized that in its review of such issues a court of appeals might conclude that the administrative record requires amplification. Since courts of appeals normally do not hold evidentiary proceedings, provision should be made for prior resort or remand to the EPA (or, if that is inappropriate, to the district court) to meet that need.

To prevent unfairness from a litigant's choice of the wrong court, Congress should provide for transfer between district courts and courts of appeals of petitions and complaints filed under the Acts. The Court of Claims transfer provision provides a good model.

3. Although both Acts provide expressly for review in the courts of appeals and for citizen suits in the district courts, it remains possible in some circumstances to obtain non-statutory review under general federal question jurisdictional statutes. But the citizen-suit provisions of both Acts require the plaintiff to give the EPA 60 days' notice of the intended district-court action. Congress should make clear that where a non-statutory review action is filed alleging grounds that correspond to those appropriate for the filing of an action under such citizen-suit provisions, failure to comply with the notice requirements of those provisions will require a dismissal of the case.

4. The Clean Air Act and the FWPCA provide that certain regulations reviewable by petition to the courts of appeals "shall not be subject to judicial review in civil or criminal proceedings for enforcement." Moreover, challenges to the validity of regulations must be made in the court of appeals within 30 days (air) or 90 days (water) after promulgation, unless the challenge is based "solely on grounds arising after" the statutory period.

The express preclusion of review at the enforcement stage creates a highly unusual and unnecessary harsh restriction on the right to challenge the validity of a regulation to which one is subject. Congress should amend the Acts to allow the validity of a regulation to be challenged in defense to an enforcement proceeding. It should also amend the Clean Air Act to extend the time limit for filing petitions for review in the court of appeals to 60 days and, for consistency, amend the FWPCA to reduce the 90-day period for filing a petition thereunder to 60 days. Finally, the time limits in both Acts should be made inapplicable where the petitioner can show reasonable grounds for failure to file a timely petition.

5. Not every action of the EPA under the Clean Air Act or the FWPCA is made reviewable in the courts of appeals. Some of the omissions appear to be inconsistent with the general statutory plan, and corrective amendments are desirable.

6. Each of the four judicial review and citizen-suit provisions in the Clean Air Act and the FWPCA presents a different standard for who may petition for review or sue. This leads to undesirable confusion and inconsistency in the administration of the Acts.

RECOMMENDATION

A. *Venue in the Courts of Appeals*

1. Congress should provide for centralized review of national standards under the FWPCA, as is now provided under the Clean Air Act, by amending Section 509(b) [33 U.S.C. § 1369(b)] to provide for the review of all such national standards in the Court of Appeals for the District of Columbia Circuit.

2. Congress should further amend section 509(b) of the FWPCA to provide that review of regulations, stand-

ards or determinations affecting single states or facilities be had in the circuit containing the state or facility.

3. Congress should amend section 307(b) of the Clean Air Act [42 U.S.C. § 1857h-5(b)] to make explicit that the Administrator's action in approving or promulgating state implementation plans is reviewable in the circuit containing the state whose plan is challenged.

4. Courts of appeals, when reviewing cases arising under the Clean Air Act or FWPCA, should utilize existing transfer powers to avoid undue duplication of proceedings, and Congress should amend the Acts or the transfer statute [28 U.S.C. § 2112(a)] to remove doubts about the authority of any court of appeals to transfer such cases to any other court of appeals to avoid undue duplication and in the interest of the administration of justice.

B. *Choice between District Court and Court of Appeals for Review*

1. Congress should amend the citizen-suit provisions of the Clean Air Act [Section 304, 42 U.S.C. § 1857h-2] and FWPCA [Section 505, 33 U.S.C. § 1365] to make clear that, insofar as suits against the Administrator of the EPA are concerned, these sections do not provide an alternative or premature method of review of questions that can be raised under the sections that provide for direct review of the EPA's actions in the courts of appeals [Section 307(b), 42 U.S.C. § 1857h-5(b); Section 509, 33 U.S.C. § 1369].

2. Congress should amend the Clean Air Act and FWPCA to provide that courts of appeals have exclusive jurisdiction of actions to compel or to postpone the issuance or revision of regulations whose validity is to be determined in a court of appeals. The amendments should provide that where there is need for the development of

a factual record, prior resort or remand shall be made to the EPA or, if that is inappropriate, to the district court.

3. Congress should provide, by analogy to 28 U.S.C. § 1506, for transfer between courts of appeals and district courts when a proceeding to review EPA action under the Clean Air Act or FWPCA is filed in the wrong forum.

C. *Limitation of Non-Statutory Review*

Congress should amend the statutes to make clear that when a non-statutory review action is filed alleging grounds that correspond to those appropriate for the filing of a citizen suit under Section 304 of the Clean Air Act [42 U.S.C. § 1857h-2] or Section 505 of the FWPCA [33 U.S.C. § 1365], failure to comply with the notice requirements of those sections will require a dismissal of the case.

D. *Raising Defenses at the Enforcement Stage*

1. Congress should amend the Clean Air Act and FWPCA to permit the validity of a regulation to be challenged in defense to an enforcement proceeding.

2. Congress should amend Section 307(b) of the Clean Air Act [42 U.S.C. § 1857h-5(b)] and Section 509(b) of the FWPCA [33 U.S.C. § 1369(b)] to prescribe 60 days as the period within which, under both statutes, a petition for review must be filed in the courts of appeals.

3. Congress should amend the Clean Air Act and FWPCA to ensure that petitions for review of regulations may be filed after the expiration of the time limits of Sections 307(b) and 509(b), when the petiitoner can show a reasonable ground for failure to file a timely petition.

E. *Actions Subject to Court-of-Appeals Review*

1. Congress should amend section 509(b) of the FWPCA [33 U.S.C. § 1369(b)] to make clear that the following actions by the EPA are reviewable in the courts of appeals:

a. Promulgation or approval of water-quality standards under Section 303 [33 U.S.C. 1313].

b. Promulgation of effluent guidelines under section 304 [33 U.S.C. 1314].

c. Promulgation of regulations governing the discharge of oil or hazardous substances under section 311(b) [33 U.S.C. 1321(b)].

d. Promulgation of standards for marine sanitation devices under Section 312 [33 U.S.C. 1322] or determinations that a state may completely prohibit the discharge from all vessels of any sewage under Section 312(f) [33 U.S.C. § 1322(f)].

2. Congress should amend the Clean Air Act to make those new-car emission standards not now reviewable under section 307(b) [42 U.S.C. § 1857h-5(b)], reviewable in the courts of appeals.

F. *Standing*

Congress should adopt a single test of standing to govern all proceedings for judicial review under the Clean Air Act and FWPCA.

SEPARATE STATEMENT OF G. WILLIAM FRICK

(1) Recommendation A.2. should be amended to provide that where "national issues" are involved they should be reviewed in the D.C. Circuit. Recommendation A.3. should be amended in the same fashion.

Cases involving permits and permit programs under the FWPCA sometimes involve generic issues that apply to EPA's actions nationwide. For essentially the reasons discussed in our comments on recommendation A.3., below, we believe such issues should be reviewed in the D.C. Circuit. This result could be specified, without disturbing the general thrust of the Recommendation, by amending § 509 of the FWPCA as suggested in our comments of November 12, 1976.

Although approval and promulgation of State implementation plans (SIP's) under the Clean Air Act usually involve issues peculiar to the affected States, such actions sometimes involve generic determinations of nationwide scope or effect. Examples include EPA's granting of two-year extensions of the date for attainment of national ambient air quality standards in a number of metropolitan areas[1] and its promulgation of generic regulations (applicable to all States) that require prevention of significant deterioration of air quality (40 CFR 52.21). We view such actions as virtually identical to promulgation of "national standards",[2] as to which recommendation A.1. expresses a preference for review in the D.C. Circuit.

Under the existing law, it is possible to argue that the D.C. Circuit is the "appropriate circuit" for review of "national" SIP issues, and three courts of appeals have so held.[3] Recommendation A.3., however, would provide

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[1] See *NRDC* v. *EPA*, 475 F.2d 968 (D.C. Cir. 1973).

[2] As with national standards, such actions typically involve establishment or application of uniform principles for all States, are taken on a single administrative record, and do not involve factual questions unique to particular geographical areas.

[3] *Dayton Power & Light Co.* v. *EPA*, 520 F.2d 703, 706-07 (6th Cir. 1975) (regulations for prevention of significant deterioration); *NRDC* v. *EPA*, 475 F.2d 968, 969-70 (D.C. Cir. 1973) (two-year extensions and similar issues); *NRDC* v. *EPA*, 465 F.2d 492, 494 (1st Cir. 1972) (same).

that such issues, together with all other SIP issues, must be in the local circuit. Although recommendation A.4. would promote transfer to avoid "undue duplication of proceedings", it would provide no basis for arguing that the D.C. Circuit is the appropriate transferee forum.

As indicated by Professor Currie in his report, Congress intended review in the D.C. Circuit of "matters on which national uniformity is desirable." Among the reasons for this are the D.C. Circuit's obvious expertise in administrative law matters and its sensitivity to Congressional mandates. In addition, the D.C. Circuit has become thoroughly familiar with the Clean Air Act—a very complex statute—and with its equally complex legislative history. We believe it makes sense to centralize review of "national" SIP issues in the D.C. Circuit, taking advantage of its administrative law expertise and facilitating an orderly development of the basic law under the Act, rather than to have such issues decided separately by a number of courts, some of which would probably lack frequent exposure to the Act and its legislative history. Moreover, the validity of a nationally applicable regulation will not turn on the particulars of its impacts within a given Circuit.

(2) Recommendation D.1., which would allow the challenge of validity of regulations in enforcement proceedings, should be deleted.

The "legislative history" of this recommendation suggests that it is inspired in part by a concern that the time limits for filing of petitions for review of the validity of regulations are too short, and in part by a concern that *any* time limit may unreasonably constrain the opportunity for such review.

As to the first factor we would much prefer the solution offered by Recommendation D.2. As to the second, we oppose the recommendation on several grounds. Permitting challenges to validity in enforcement would leave open the question of validity indefinitely, notwithstanding Congress' intent to have it decided expeditiously;[4] would require EPA to retain its often immense records indefinitely; would mean district court rather than court of appeals review of validity, notwithstanding the clear intent of Congress; and might very well lead to conflicting results, with resolution of conflicts (if at all) only after review by the courts of appeals and the Supreme Court. In our view, facial validity need be determined only once and should be determined expeditiously; there are other mechanisms for relief based on factors peculiar to individual sources (see comments on recommendation D.3.), and it makes no sense to require every district court presented with the issue of validity to engage in duplicative review of the often immense records involved.

The Recommendation glosses over that fact that State implementation plans, which have and will continue to make up the vast majority of onerous air pollution requirements, can be challenged facially and on grounds of infeasibility through administrative and judicial review channels in the States.[5]

Finally, as Professor Walter Gellhorn observed at the Plenary Session, there is an inherent contradiction between Recommendations D.1. and D.3., viz., the argument is for extending the deadlines for obtaining review while at the same time espousing that there should be no deadline for obtaining review. That the federal courts involved are at different levels does not cure this contradiction.

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[4] See *Kennecott Copper Corp.* v. *EPA*, 462 F.2d 846, 849 & nn. 14-15 (D.C. Cir. 1972). Expeditious resolution of SIP issues is particularly important because Congress mandated attainment of the health-protective ambient air quality standards (via SIP's) by a time certain, regardless of economic or technical feasibility.

[5] See *Union Electric Co.* v. *EPA*, 96 S. Ct. 2518 (1976).

(3) Recommendation D.3., which would allow late filings of petitions for review upon reasonable grounds shown, should be deleted.

The "legislative history" of this recommendation suggests a number of concerns that may have prompted it: (a) the problem of short time limits; (b) the problem of persons who fail to file through carelessness; (c) lack of opportunity for consideration of individual factors that might affect validity; and (d) the problem of persons who are unaffected by a regulation until after the deadline for filing has passed. My comments are as follows:

(a) Short time limits. We prefer Recommendation D.2. as providing a more direct solution to this problem, if it is thought to be a problem. Protection of one's rights need not await detailed analysis of what EPA has actually done; common practice is to file one-paragraph petitions alleging that EPA's action was arbitrary or capricious, or similarly general grounds.

(b) Carelessness. The industries we regulate generally submit extensive comments on proposed regulations, sometimes "lobby" the agency extensively, often mount well-coordinated attacks on final regulations in court, and seem to follow the development of regulations rather well. And, even before publication of proposals in the FEDERAL REGISTER, they receive notice through EPA's gathering of supporting data from them, through trade associations, through industry representatives on EPA advisory committees, or during pre-publication review by other federal agencies. We believe the public interest in early resolution of validity (clearly intended by Congress) should outweigh the interests of those who fail to file timely petitions through carelessness.

(c) Individual factors that might affect validity. As Professor Currie seems to acknowledge in his report, individual factors are often if not always irrelevant to the

validity of EPA regulations. Those cited as examples do not appear to be grounds for challenge of SIP approvals,[6] for example, or of national standards adopted under §§ 111 or 112 of the Clean Air Act (42 U.S.C. 1857c-6, 1857c-7). Relief based on such factors may be available through a variety of mechanisms,[7] but they do not go to the validity of the regulations.

(d) Previously unaffected parties. In our view, persons who choose to do business in a regulated industry (or to expand into a geographical area subject to controls) after the establishment of applicable regulations take the business (or the area) as they find it. If a company invents a new process that presents particular problems under an applicable regulation, it may petition for revision of the regulation.

Finally, we note that this recommendation would leave the question of validity open indefinitely, with all the problems that would entail (see discussion of Recommendation D.1.).

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[6] See *Union Electric Co.* v. *EPA*, *supra*.

[7] Under the Clean Air Act, for example, relief may be available by way of SIP revisions (including variances) approved or promulgated by EPA, postponements of SIP requirements under 42 U.S.C. 1857c-5(f), enforcement orders fixing a "reasonable time" for compliance (42 U.S.C. 1857-c-8(a)(4)), equitable relief provided by court order in enforcement proceedings (*see* 42 U.S.C. 1857c-8(b)), waivers or exemptions under 42 U.S.C. 1857c-7, or petition for revision of any applicable regulation.